SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 531

UNITED STATES, Appellant,

vs.

BEN BLUE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 33950 CD

February, 1964 Grand Jury

UNITED STATES OF AMERICA, Plaintiff,

v.

BEN BLUE, Defendant.

INDICTMENT—Filed August 5, 1964

[26 U.S.C. §7201—Tax evasion 26 U.S.C. §7206(1)—Subscribing false corporate return]

The Grand Jury charges:

COUNT ONE

[26 U.S.C. §7201]

On or about April 15, 1959 in the Southern District of California, Central Division, defendant

Ben Blue,

who during the calendar year 1958 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1958, by filing and causing to be filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent joint income tax return on behalf of himself and his said wife; wherein it was stated that their taxable income for said calendar year was the sum of $30,761.66, and that the amount of tax due and owing thereon

was the sum of $9,817.98, whereas, as he then and there well knew, their joint taxable income for the said calendar [fol. 3] year was the sum of $36,936.92, upon which said taxable income there was owing to the United States of America an income tax of $12,649.56.

[fol. 4] COUNT TWO

[26 U.S.C. §7201]

On or about April 15, 1960 in the Southern District of California, Central Division, defendant Ben Blue, who during the calendar year 1959 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1959, by filing and causing to be filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent joint income tax return on behalf of himself and his said wife; wherein it was stated that their taxable income for said calendar year was the sum of $28,372.98, and that the amount of tax due and owing thereon was the sum of $8,695.30, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $57,324.40, upon which said taxable income there was owing to the United States of America an income tax of $23,794.80.

[fol. 5] COUNT THREE

[26 U.S.C. §7201]

On or about June 30, 1961, in the Southern District of California, Central Division, defendant Ben Blue did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1960 by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent income tax return, wherein he stated that his taxable income for the said calendar year was the sum of $12,107.86 and that

the amount of tax due and owing thereon was the sum of $3,442.98, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $22,927.88, upon which said taxable income he owed to the United States of America an income tax of $8,491.25.

[fol. 6] COUNT FOUR

[26 U.S.C. §7206(1)]

On or about March 10, 1959 in the Southern District of California, Central Division, defendant Ben Blue did wilfully and knowingly make and subscribe a United States Corporation Income Tax Return (Form 1120) on behalf of Merry-Go-Round, Inc., a California corporation, for the calendar year 1958 which was verified by a written declaration that it was made under the penalties of perjury, which said United States Corporation Income Tax Return he did not believe to be true and correct as to every material matter in that said United States Corporation Income Tax Return stated that the taxable income for Merry-Go-Round, Inc. for the calendar year 1958 was $25,602.19 and that the tax thereon was $7,813.14 whereas, as he then and there well knew and believed, the correct taxable income was $29,589.45 and that the tax thereon was $9,886.51; and said corporation tax return was filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California.

[fol. 7] COUNT FIVE

[26 U.S.C. §7206(1)]

On or about March 12, 1960 in the Southern District of California, Central Division, defendant Ben Blue did wilfully and knowingly make and subscribe a United States Corporation Income Tax Return (Form 1120) on behalf of Merry-Go-Round, Inc., a California corporation, for the calendar year 1959 which was verified by a written declaration that it was made under the penalties of perjury, which said United States Corporation Income Tax Return he did not believe to be true and correct as to every

material matter in that said United States Corporation Income Tax Return stated that the taxable income for Merry-Go-Round, Inc. for the calendar year 1959 was $24,672.28 and that the tax thereon was $7,401.68 whereas, as he then and there well knew and believed the correct taxable income was $41,823.45 and that the tax thereon was $16,248.19; and said corporation tax return was filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California.

[fol. 8] COUNT SIX

[26 U.S.C. §7206(1)]

On or about June 8, 1961, in the Southern District of California, Central Division, defendant Ben Blue did wilfully and knowingly make and subscribe a United States Corporation Income Tax Return (Form 1120) on behalf of Merry-Go-Round, Inc., a California corporation, for the calendar year 1960 which was verified by a written declaration that it was made under the penalties of perjury, which said United States Corporation Income Tax Return he did not believe to be true and correct as to every material matter in that said United States Corporation Income Tax Return stated that the taxable income for Merry-Go-Round, Inc. for the calendar year 1960 was $3,736.85 and that the tax thereon was $1,121.06 whereas, as he then and there well knew and believed, the correct taxable income was $21,855.95 and that the tax thereon was $6,556.79; and said corporation tax return was filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California.

A True Bill.

G. I. Phelan, Foreman.

Francis C. Whelan, United States Attorney.

* * * * * * *

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

[Title omitted]

MINUTE ORDER RE ARRAIGNMENT AND PLEA—
Filed August 17, 1964

Defendant is arraigned and states his true name is as charged and pleads Not Guilty as to all 6 Counts of the Indictment.

The court orders case transferred to the calendar of Judge Hall and continued to September 15, 1964, 10:00 A.M., for setting, and time to file motion extended 20 days.

* * * * * * *

[fol. 72] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 33950 CD

[Title omitted]

NOTICE OF MOTION TO DISMISS INDICTMENT—
Filed November 24, 1964

To: MANUEL L. REAL
United States Attorney
Attorney for Plaintiff
312 North Spring Street
Los Angeles 12, California

PLEASE TAKE NOTICE, that the undersigned will bring on a Motion to Dismiss for hearing before the Honorable Peirson M. Hall in Room One, United States Court

House, 312 North Spring Street, City of Los Angeles, on the 7th day of December, 1964 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Mortenson and Maxwell
By: Clyde R. Maxwell
Attorneys for Defendant

Dated: 23rd day of November, 1964

[fol. 73]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 33950 CD

MOTION TO DISMISS INDICTMENT—Filed November 24, 1964

The defendant, Ben Blue, hereby moves the Court to dismiss the indictment herein on the grounds that the United States, by the levy of a jeopardy assessment, the filing of income tax liens and the seizure of the defendant's properties, has made it impossible for the defendant to have a fair trial, has deprived the defendant of the due process of law, has denied the defendant the right to employ counsel of his choice and has compelled the defendant to testify against himself all in violation of the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. In support of said Motion, defendant respectfully alleges:

1. That on August 6, 1964 defendant herein was indicted for the evasion of the income taxes of himself and his wife for the years 1958 and 1959 and of himself for the year 1960 and for knowingly making and subscribing false corporation income tax returns on behalf of Merry-Go-[fol. 74] Round, Inc., a California corporation, for the years 1958 to 1960, inclusive.

2. Defendant Ben Blue is a well known theatrical artist who has been entertaining the American public for over forty years. During the years 1958 to 1960 and at the

present time, defendant was, and now is, married to Axie Blue. During said period of time they did own and now do own all of the stock of two California corporations, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc.

3. That although defendant, Axie Blue, and Merry-Go-Round, Inc. had extended the applicable statute of limitations for assessment to June 30, 1964 at the request of the United States, on April 9, 1963 without notice to the defendant, the United States made so-called "jeopardy" assessments of the following income and excise taxes, penalties and interest, under the provisions of §6861(a) of the Internal Revenue Code of 1954:

		Deficiency	*Penalty*	*Interest to 4/9/63*
Ben & Axie Blue	Income tax 1958	$ 12,023.18	$ 6,011.59	$2,874.86
Ben & Axie Blue	Income tax 1959	28,015.27	14,007.64	5,017.80
Ben Blue	Income tax 1960	12,726.19	6,363.10	1,515.81
Axie Blue	Income tax 1960	12,569.66		1,497.17
Merry-Go-Round	Income tax 1958	13,861.73	6,930.87	3,383.78
Merry-Go-Round	Income tax 1959	41,610.73	20,805.37	7,660.93
Merry-Go-Round	Income tax 1960	28,460.58	14,230.29	3,532.23
Merry-Go-Round	Excise tax 1/1/58 to 12/31/60	17,115.43	8,557.72	3,504.70

4. That on or about April 9, 1963, the United States made income tax liens of public record pursuant to said assessments.

5. That pursuant to said assessments and liens on April 12, 1963 the United States levied upon and seized the amount of $5,387.38 which was the community property of the defendant and Axie Blue, his wife, and was on deposit in a savings account in the name of Axie Blue at the Beverly Hills Federal Savings and Loan Association, 9424 Wilshire Boulevard, Beverly Hills, California.

6. That on April 12, 1963 the United States levied upon and seized $10,434.68 from an account in the name of [fol. 75] Merry-Go-Round, Inc. on deposit with Security First National Bank, 1401 Wilshire Boulevard, Santa Monica, California.

7. That on April 12, 1963 the United States levied upon and seized the amount of $4,032.12 on deposit in an account in the name of Ben Blue with the City National Bank, Roxbury and Wilshire, Beverly Hills, California.

8. That on April 17, 1963 the United States levied upon

and seized $15,617.70 on deposit in the name of Merry-Go-Round, Inc. with Julius Stern, 1528 West Seventh Street, Los Angeles, California.

9. That on April 17, 1963 the United States levied upon and seized all right, title and interest that the defendant and his wife, Axie Blue, had in an account under the name of Pantomine Enterprises, Inc. at Ira Haupt and Company, 166 North Canon Drive, Beverly Hills, California which account contained the following securities and credits of the following approximate values:

Number of Shares	*Name of Security*	*Quotation*	*Market Value*
200	Beckman Instrument	73.25	$ 14,650
300	Great Northern R.R.	61.25	18,375
400	Hertz Corporation	32 ⅝	13,050
200	May Company	57.25	11,450
600	M.C.A. Inc.	46 ⅛	27,675
400	Pitney-Bowes, Inc.	40.5	16,200
303	Revlon, Inc.	38 ⅝	11,703
400	Sears Roebuck & Co.	134	53,600
Credit Balance (Accrued Dividends)			3,839.14
TOTAL			$170,542.14

That since said levy has been made said securities and credits have been held by said Ira Haupt and Company and its successor Francis I. DuPont and Company subject solely to the order of the United States.

10. That on April 18, 1963 the United States levied upon and seized all right, title and interest that the defendant and his wife had in an account under the name of Pantomine Enterprises, Inc. at Bache and Company, 445 North Roxbury Drive, Beverly Hills, California which account [fol. 76] contained the following securities and credits of the following approximate market values.

Number of Shares	*Name of Security*	*Quotation*	*Market Value*
202	Revlon, Inc.	38⅝	$7,802
Credit Balance (Accrued Dividends)			276.65
TOTAL			$8,078.65

11. That at the time said jeopardy assessment, tax liens and levies were made, the United States had made a determination to institute the within criminal proceedings against the defendant.

12. Under date of June 6, 1963 the United States issued statutory notices of deficiencies against the defendant, his wife and Merry-Go-Round, Inc. for the following periods and in the following amounts:

Taxpayer	*Year*	*Tax*	*Deficiency*	*Penalty*
Ben & Axie Blue	1958	Income	$ 9,172.51	$ 4,586.26
Ben & Axie Blue	1959	Income	20,492.94	10,246.47
Ben Blue	1960	Income	5,339.75	2,669.88
Axie Blue	1960	Income	5,246.81	
Merry-Go-Round	1958	Income	12,317.76	6,158.88
Merry-Go-Round	1959	Income	39,287.18	19,643.59
Merry-Go-Round	1960	Income	24,906.60	12,453.30

13. Said notices stated that the assessments of April 9, 1963 were erroneous and would be abated to the extent that they exceeded the deficiencies set forth herein above. Each of said statutory notices contained the following statement:

> "If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C."

[fol. 77] 14. Under date of June 19, 1963 the United States notified Merry-Go-Round, Inc. that the jeopardy assessment made against it on April 9, 1963 for excise tax for the taxable period January 1, 1958 to December 31, 1960 had been excessive in that it overassessed excise tax in the amount of $4,128.83, penalties in the amount of $2,-064.40, and interest in the amount of $744.20.

15. That of the funds seized as above set out, the District Director of Internal Revenue at Los Angeles, California applied $26,052.38 to the alleged deficiencies, penalties and interest which it was asserted that Merry-Go-Round, Inc. owed for excise taxes for the period January 1, 1958 to December 31, 1960.

16. That Merry-Go-Round, Inc. on July 2, 1963 filed a claim for refund for said amount of $26,052.38; that no action was taken on said claim by the District Director of

Internal Revenue and on April 28, 1964, Merry-Go-Round, Inc. brought suit in the United States District Court for the Southern District of California, Central Division for recovery of said amounts so seized and so applied to its alleged Federal excise tax liability for said period, said suit being No. 64-561-HW; that said suit is still pending and no action has been taken thereon by the United States.

17. That pursuant to said statutory notices, petitions to the Tax Court of the United States were filed contesting the taxes and penalties alleged to be due by the United States on behalf of Ben Blue, Axie Blue and Merry-Go-Round, Inc. That as required by the rules of the Tax Court of the United States, said petitions were verified by petitioners and stated the facts upon which petitioners relied in contesting said deficiencies in tax and penalties. Said petitions were filed on July 29, 1963 and copies thereof served on the United States on July 30, 1963 and are docketed as Docket Nos. 3612-63 to 3615-63 in the records of the Tax Court of the United States. Said petitions are tentatively scheduled for trial on March 8, 1965 at Los Angeles, California.

[fol. 78] 18. That by reason of the aforesaid assessments and the consequent filing of tax liens and seizure of defendant's assets and those of his wholly owned corporations Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. the defendant is unable to retain counsel of his choice and is unable to retain the necessary accountants and investigators to properly prepare his case for trial as he would have been able to do had the assessments liens and levies not been made against him, his wife and his wholly owned corporations.

19. That the defendant by and through attorneys specially retained for said purposes did advise the United States both prior to and subsequent to the return of the indictment herein that he would be unable to properly prepare for the trial of a criminal case and to retain the attorneys of his choice unless said assessments and tax liens were abated and revoked and his property released by the United States; and defendant made demand upon

the United States for it so to do but all said demands were denied and refused.

20. That there is a general administrative policy of the United States that in cases where criminal tax charges are to be instituted against an individual, no assessment or statutory notice will be issued by the United States until the criminal proceedings have been concluded. That failure to accord defendant the benefits of this policy has denied him due process of law.

21. That by virtue of the assertion of taxes, penalties and interest against the defendant, the filing of income tax liens and the seizure of his assets, the defendant has been compelled to execute statements of fact pertaining to his income tax liabilities for the years 1958 to 1960, inclusive, in pleadings required to be presented to the Tax Court of the United States and to the Internal Revenue Service, thereby compelling this defendant to testify against himself in violation of the Fourth and Fifth [fol. 79] Amendments to the Constitution of the United States.

22. That many of the above-stated facts cannot be supported fully by affidavit but must be established at a hearing wherein defendant can compel testimony of witnesses now in the employ of the United States Government and can adduce documents now in the possession of the United States Government.

WHEREFORE, the defendant prays that the Court grant the defendant a hearing on this Motion wherein defendant can compel the testimony of witnesses and can adduce documents;

That the indictment herein be dismissed on the grounds and for the reasons that:

1. That he would be able to have a fair trial

2. That he has been denied the right to counsel of his own choice in violation to the Sixth Amendment to the Constitution of the United States, and

3. That he has been compelled to testify against himself in related proceedings in violation of his rights under

the Fourth and Fifth Amendments to the Constitution of the United States;

and for such other relief as the Court may deem just.

Respectfully submitted,

Mortenson and Maxwell
By: Ernest R. Mortenson

Dated: 23rd day of November, 1964

[fol. 80] No. 33950 CD

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICTMENT

ERNEST R. MORTENSON being duly sworn on oath, deposes and says:

1. That on or about May 25, 1961 he was retained by Ben Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. to represent them before the Treasury Department in connection with Federal taxes of all kinds for any and all years.

2. That deponent is informed and believes it to be true that defendant Ben Blue is a well known theatrical artist who has been entertaining the American public for over forty years; that during the years 1958 to 1960 and at the present time, defendant was, and now is, married to Axie Blue; that during said period of time they did own and now do own all of the stock of two California corporations, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc.

3. That after said date numerous conferences were held [fol. 81] with Special Agent Charles C. Freeman and Internal Revenue Agent John D. Katz concerning the income tax liabilities of Ben Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. for the years 1958 to 1960, inclusive.

4. That on or about January 29, 1962 he received a request dated January 25, 1962 from Revenue Agent John D. Katz to execute extension of the period of limitation for assessment of income taxes against Pantomine Enterprises, Inc. for the taxable year ended November 30, 1959,

Merry-Go-Round, Inc. for the taxable year ended December 31, 1958 and Ben and Axie Blue for the taxable year ended December 31, 1958. These consents were executed and the statute of limitations for said taxable years for the stated corporations and individuals were extended to June 30, 1963.

5. That at his request the Internal Revenue Service furnished under dates of April 23, 1962 and October 30, 1962, information as to income tax payments made by Ben and Axie Blue for the years 1932 to 1960 in the total amount of $126,672.60.

6. That on November 2, 1962 he was advised in writing by Robert K. Lund, Chief, Intelligence Division, Office of Director of Internal Revenue, Los Angeles, California, that consideration was being given to possible criminal proceedings against defendant Ben Blue for attempted evasion of his income taxes and those of Merry-Go-Round, Inc. for the years 1958 to 1960, inclusive, and that he was offered at that time a conference with Daniel J. Breslin, Group Supervisor, of the Intelligence Division on November 13, 1962 at Los Angeles, California. Such a conference was held and he was advised that the District Director would recommend prosecution of Ben Blue for the years 1958, 1959 and 1960 for income tax evasion and for evasion of the taxes of Merry-Go-Round, Inc. for the same years.

7. That on February 20, 1963 Robert A. Riddell, District Director of Internal Reveneue, Los Angeles District, [fol. 82] requested additional extension of the period of limitation for Ben Blue and Axie Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. from April 15 and June 30, 1963 to and including June 30, 1964. These consents were executed and forwarded to John D. Katz, Internal Revenue Agent, on March 7, 1963 and were received by the Audit Division on March 8, 1963.

8. That at the written invitation of Raphael Pierce, Acting Assistant Regional Commissioner, Intelligence, San Francisco Region of the Internal Revenue Service, a conference was held with Reviewer-Conferee Thomas S. McCart on March 8, 1963 at Room 1276, Flood Building, 870 Market Street, San Francisco, California. At this con-

ference he was again advised that the Internal Revenue Service had recommended prosecution of defendant Ben Blue for evasion of his taxes and those of Merry-Go-Round, Inc. for the years 1958 to 1960, inclusive.

9. That on April 9, 1963, despite the fact that one month previous thereto, the respective taxpayers Ben Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. had executed consents to extend the statute of limitations to June 30, 1964 with respect to their tax liabilities for the years 1958 and 1959, the Director of Internal Revenue at the specific request of the Intelligence Division of the Office of the District Director at Los Angeles, did make assessments against the defendant, Ben Blue, Axie Blue, his wife, and Merry-Go-Round, Inc. and pursuant to these assessments, on said date or shortly thereafter, the Director of Internal Revenue filed liens against all of the assets and properties of the defendant Ben Blue, Axie Blue, his wife, and Merry-Go-Round, Inc. and levied upon and seized the bank accounts and other assets of Ben and Axie Blue and Merry-Go-Round, Inc. as well as the brokerage accounts of Pantomine Enterprises, Inc. (as set out in the Motion to Dismiss). The assessments were in the following amount for the following individuals or corporations:
[fol. 83]

Taxpayer	*Year*	*Tax*	*Amount of Tax*	*Penalty*	*Interest*
Ben & Axie Blue	1958	Inc.	12,023.18	6,011.59	2,874.86
Ben & Axie Blue	1959	Inc.	28,015.27	14,007.64	5,017.80
Ben Blue	1960	Inc.	12,726.19	6,363.10	1,515.81
Axie Blue	1960	Inc.	12,569.66		1,497.17
Merry-Go-Round, Inc.	1958	Inc.	13,861.73	6,930.87	3,383.78
Merry-Go-Round, Inc.	1959	Inc.	41,610.73	20,805.37	7,660.93
Merry-Go-Round, Inc.	1960	Inc.	28,460.58	14,230.29	3,532.23
Merry-Go-Round, Inc.	1/1/58 to 12/31/60	Excise	17,115.43	8,557.72	3,504.70

10. That deponent is informed and believes it to be true that levies and seizures of the assets of defendant Ben Blue and his wife, Axie Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. were made as described in paragraphs 5 to 10 of the within Motion to Dismiss to which this affidavit is attached.

11. That without demand or request on the part of the defendant or Merry-Go-Round, Inc., on or about June 12,

1963 the District Director of Internal Revenue recognized that said assessments were excessive in amount and issued new jeopardy assessments in a smaller amount and abated in part, the first assessments. The corrected assessments were in the following amounts:

Taxpayer	*Year*	*Tax*	*Amount of Tax*	*Penalty*
Ben & Axie Blue	1958	Inc.	$ 9,172.51	$ 4,586.26
Ben & Axie Blue	1959	Inc.	20,492.94	10,246.47
Ben Blue	1960	Inc.	5,339.75	2,669.88
Axie Blue	1960	Inc.	5,246.81	
Merry-Go-Round, Inc.	1958	Inc.	12,317.76	6,158.88
Merry-Go-Round, Inc.	1959	Inc.	39,287.18	19,643.59
Merry-Go-Round, Inc.	1960	Inc.	24,906.60	12,453.30

12. That on or about June 7, 1963, defendant was advised by the United States that the above assessments had been made and given ninety days within which to file petitions with the Tax Court if he desired to controvert the amounts claimed by the United States to be due and owing in any way.

13. That on or about July 29, 1963 the defendant, Axie Blue and Merry-Go-Round, Inc. filed petitions to the Tax Court in accordance with said instructions. That said [fol. 84] petitions as required by Tax Court Rules of Practice and Procedure contained clear concise statements of facts upon which petitioners intended to rely.

13. That on or about July 2, 1963, Merry-Go-Round, Inc. filed claim for refund of monies seized by the United States and applied to the excise tax assessment, as above set out, which claim contained a statement of facts upon which Merry-Go-Round, Inc. relied. That no action was taken upon said claim for a period of six months and more, whereupon and on or about April 28, 1964 Merry-Go-Round, Inc. filed suit for refund of said amounts, stating facts in the complaint upon which it relied.

14. That at the recommendation of the Internal Revenue Service and the United States, an indictment was returned against defendant on August 6, 1964, wherein he was charged with the evasion of the individual income taxes of himself and his wife for 1958 and 1959; of himself for 1960; and for making and subscribing false returns for Merry-Go-Round, Inc. for 1958 to 1960, inclusive, as follows:

Count	*Taxpayer*	*Year*	*Additional Tax Due*
1	Ben and Axie Blue	1958	$ 2,831.58
2	Ben and Axie Blue	1959	15,099.50
3	Ben Blue	1960	5,048.27
4	Merry-Go-Round, Inc.	1958	2,073.37
5	Merry-Go-Round, Inc.	1959	8,846.51
6	Merry-Go-Round, Inc.	1960	5,435.73

15. That deponent is informed and believes it to be true that all of defendant's assets have been seized by the United States and since the indictment herein he has not received any funds with which he could employ the attorney of his choice. That the United States has filed income tax liens against the defendant herein, Axie Blue, his wife, and Merry-Go-Round, Inc. in the amounts of the original assessments set out in paragraph 9 herein and deponent is informed and believes it to be true that said liens have not been released and are still valid and subsisting [fol. 85] in their original amounts. That deponent is informed and believes that the defendant did not, at the time of said assessment, or at any time since, have sufficient funds or assets with which to pay his current tax liabilities together with said assessments; and that he was then and now is without sufficient funds to post bond to relieve himself of the onus of said assessment.

16. That defendant has requested the United States to abate said assessments, vacate said liens and to return the assets seized to the defendant or Merry-Go-Round, Inc. but it has refused to do so, even though advised that defendant otherwise will be unable to retain counsel for his defense in this action. That the assets seized and held by the United States are sufficient to enable defendant to employ counsel of his choice and to employ accounting assistance and otherwise prepare for trial of this matter.

17. That deponent is informed and believes that there is a general administrative policy of the United States that in cases where criminal tax charges are to be instituted against an individual, no assessment or statutory notice will be issued by the United States until the criminal proceedings have been concluded.

18. That your deponent and his associate, Clyde R. Maxwell, have thus far appeared on behalf of the defend-

ant since indictment without retainer or fee and on the understanding that they may withdraw at any time.

19. That in addition to the services of counsel of his choice, it is the opinion of deponent that defendant requires the services of an expert accountant to properly prepare his defense in this case and for the assistance of counsel at trial as well as transcripts and other expenses of trial.

20. That deponent believes it to be necessary that a full opportunity be given the defendant to establish the above facts to the satisfaction of the Court and that this motion [fol. 86] be set for hearing on a day certain at which time the Court can hear testimony and take evidence.

21. That this affidavit is made in support of Motion to Dismiss the indictment in the above-entitled matter.

/s/ Ernest R. Mortenson
Ernest R. Mortenson
Attorney for Ben Blue

* * * * * * *

Duly sworn to by Ernest R. Mortenson. [jurat omitted in printing].

* * * * * * *

[fol. 125] [File endorsement omitted]

In the United States District Court
for the Southern District of California
Central Division

[Title omitted]

No. 33950 (PH) CD

Oppostion to Motion to Dismiss Indictment—
Filed December 7, 1964

The Government opposes the motion of defendant, Ben Blue, to dismiss the Indictment herein for the following reasons:

1. The making of a jeopardy assessment and subsequent liens and levies have not deprived defendant, Ben Blue, of any rights protected by the United States Constitution;

2. The court cannot determine, in advance of trial, whether or not defendant, Ben Blue, will have effective assistance of counsel at the trial.

This Opposition is based on the attached Memorandum [fol. 126] of Points and Authorities and the files and records of the case.

Respectfully submitted,

MANUEL L. REAL
United States Attorney
JOHN K. VAN DE KAMP
Assistant U. S. Attorney
Chief, Criminal Section
J. BRIN SCHULMAN
Assistant U. S. Attorney
Assistant Chief, Criminal Section
/s/ J. BRIN SCHULMAN
Attorneys for Plaintiff,
United States of America

[fol. 127]

MEMORANDUM OF POINTS AND AUTHORITIES

I.

GROUNDS OF DEFENDANT'S MOTION

Defendant, Ben Blue, has filed a motion to dismiss the Indictment herein on the following stated grounds:

> "... that the United States, by the levy of a jeopardy assessment, the filing of income tax liens and the seizure of the defendant's properties,
>
> has made it impossible for the defendant to have a fair trial,
>
> has deprived the defendant of the due process of law,
>
> has denied the defendant the right to employ counsel of his choice,
>
> and has compelled the defendant to testify against himself,
>
> all in violation of the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States."

II.

UNQUALIFIED CONCESSIONS BY THE GOVERNMENT

For the purpose of response to this motion only, the Government concedes the substantial accuracy of the following numbered paragraphs contained in defendant's moving papers:

1. Motion To Dismiss Indictment:

   1-6, inclusive,
   8

   12-14, inclusive, and
   17.

[fol. 128] 2. Affidavit in Support of Motion To Dismiss:

   1-5, inclusive,

   7 (including only page 3, lines 16-24, ending with words ". . . Merry-Go-Round, Inc. . . ", excluding balance of lines 24-30, and including lines 31-32, and page 4, lines 1-7),

   10-12, inclusive,

   13—on page 4, is excluded herefrom,

   13 (herein referred to as 13(a))—on page 5, is included herein,

   14.

III.

QUALIFIED CONCESSIONS BY THE GOVERNMENT

The Government concedes, as herein qualified, for the purpose of response to this motion only, the otherwise substantial accuracy of the following numbered paragraphs contained in defendant's moving papers:

1. Paragraph 7 of Motion:

   That the bank account referred to therein was in the name of Pantomine Enterprises, Inc.

2. Paragraphs 9 and 10 of Motion:

That the total market value of the stocks listed therein is as of the week of November 16, 1964.

3. Paragraph 15 of Motion:

That of the funds so seized, only $22,240.42 was applied to Merry-Go-Round, Inc., owed excise taxes.

[fol. 129] 4. Paragraph 16 of Motion:

That, contrary to line 20 thereof, on December 1, 1964, the Government filed its answer to this civil suit, Civil No. 64-561-HW, in the District Court. The said filing of an answer followed four stipulations between plaintiff, Ben Blue, therein, and the Government, extending the time within which the Government answer or otherwise plead. These stipulations were filed on or about the following dates—June 25, July 14, September 15 (amended on September 30), and November 24, 1964; the Government's answer was timely.

5. Paragraph 6 of Affidavit:

The Government sets out as an attachment hereto, a copy of the letter referred to herein. It is conceded that such a conference was held with Mr. Breslin, and that Mr. Breslin advised Mr. Mortenson, defendant's attorney, in substance that the *Special Agent*, with Mr. Breslin's concurrence, *would recommend* prosecution, as stated in this paragraph.

6. Paragraph 9 of Affidavit:

Lines 16 to 24 are conceded, and it is further conceded that levies served were *only* on those properties in which the Internal Revenue Service believed Ben Blue had an interest. It is not conceded that such levies covered *all* of the bank accounts or assets of Ben Blue, Axie Blue or of his corporations, or *any* bank account at all in the name of Ben Blue. The substantial accuracy of the balance of the paragraph is otherwise conceded.

* * * * * * *

[fol. 153] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

[Title omitted]

No. 33950 CD

REPLY TO OPPOSITION TO MOTION TO DISMISS INDICTMENT—
Filed December 29, 1964

For reply to opposition of the United States to dismiss indictment, the defendant Ben Blue states:

I.

Defendant accepts the unqualified concessions of fact contained in paragraph II of the Memorandum of Points and Authorities submitted by the United States attached to the Opposition to Motion to Dismiss Indictment.

II.

The defendant accepts the concessions of fact made by the United States in Paragraph III of the Memorandum of Points and Authorities attached to the Opposition to Motion to Dismiss Indictment. As to the qualifications of said concessions expressed in arabic numbered paragraphs in said Paragraph III, the defendant accepts the qualifications contained in Paragraphs 1, 2, 4 and 5 and makes no statement as to the qualifications proposed in Para-
[fol. 154] graphs 3 and 6.

WHEREFORE, defendant prays that the indictment herein be dismissed upon the grounds set out in his Motion to Dismiss.

* * * * * * *

[fol. 162]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

[Title omitted]

MINUTE ORDER DISMISSING INDICTMENT—February 8, 1965

Hearing on motion of defendant to dismiss; Earl Gardner, Ralph Leslie, Robert K. Lund, John D. Katz, Thos. R. Sheridan and Earnest Mortensen are sworn as witnesses for defendant.

Defendant's exhibits A, B, C, D, E, F, and G, and plaintiff's exhibit 1 admitted in evidence; both sides rest.

Court hears statement of counsel, and indictment dismissed; defendant discharged; bond exonerated.

* * * * * * *

[fol. 164] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 33950 (PH) CD

[Title omitted]

NOTICE OF APPEAL—Filed March 9, 1965

The appellant is the United States of America.

Appellant's attorney is Manuel L. Real, by John K. Van de Kamp, Chief, Criminal Division and J. Brin Schulman, Assistant Chief, Criminal Division.

The address of appellant and of appellant's attorney is 600 Federal Building, Los Angeles, California 90012.

The offenses charges in the six counts of the Indictment against defendant-appellee Ben Blue, are in substance as follows:

Counts One, Two and Three:

Wilful attempts to evade and defeat personal income tax due and owing to the United States, by filing false and fraudulent income tax returns for each of the respective years 1958, 1959 and 1960, in violation of Title 26, United States Code, Section 7201;

Counts Four, Five and Six:

Wilful making and subscribing false corporate income [fol. 165] tax returns (Form 1120) on behalf of Merry-Go-Round, Inc., a California corporation, for each of the respective years 1958, 1959 and 1960, in violation of Title 26, United States Code, Section 7206(1).

The order appealed from is the order of the Honorable Peirson M. Hall, made and entered February 8, 1965, granting defendant Ben Blue's motion to dismiss the indictment, and dismissing the said indictment on the stated ground that the defendant's right against compulsory self-incrimination had been violated as a result of the making of a jeopardy assessment against said Ben Blue by the Internal Revenue Service, at a time when said Service had a criminal investigation then pending relating to said Ben Blue and which said jeopardy assessment required defendant Ben Blue to thereafter file a verified Petition in the Tax Court of the United States, all prior to the indictment in the case.

The defendant-appellee is not in custody.

Appellant United States of America hereby appeals from the said Order of February 8, 1965, dismissing the Indictment herein.

Dated: March 8, 1965.

Respectfully submitted,

MANUEL L. REAL
United States Attorney
JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division
/s/ J. BRIN SCHULMAN
Assistant United States Attorney
Assistant Chief, Criminal Division

* * * * * * *

[fol. 174] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Honorable Charles H. Carr, Judge Presiding

No. 33950—Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

BEN BLUE, Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * * * *

[fol. 175] Los Angeles, California, Monday, August 17, 1964. 9:30 a.m.

(Other court matters.)

The Clerk: Item 34 on the calendar, Case No. 33950—Criminal, United States of America v. Ben Blue.

Mr. Mortenson: Ernest R. Mortenson and Clyde R. Maxwell appearing for Ben Blue.

May I make a statement, your Honor?

The Court: Yes, I suppose you can, counsel. It is a free country.

Mr. Mortenson: We are appearing specially today for purposes of plea. The reason for that is that in April 1963 the Government seized all of Ben Blue's assets in excess of $150,000.00, and he does not presently have money to pay counsel.

So we would like to appear specially this morning. We are going to request that the funds be released for purposes of employing counsel.

The Court: Well, who are you going to apply to to get the funds released? Not to me.

Mr. Mortenson: Well, that is a good question.

The Court: I have no power.

Mr. Mortenson: No.

The Court: If I did have I would grant it immediately. [fol. 176] Mr. Mortenson: Well, we are going to make a request of the Internal Revenue Service probably through the United States Attorney. If that is refused, then we will file a motion probably to dismiss the indictment.

The Court: Well, it would be a good time to test the constitutionality of making a man destitute when he needs a defense.

Mr. Mortenson: I think so, your Honor.

The Court: They are always preaching and talking about—when I say "they" I am talking about from the top to the bottom—about constitutional rights. If you take all of a man's money, why, the thing is I guess you can't live by bread alone, but you can't live without money alone either, especially in defending a case, an income tax case. It takes some work, considerable work, usually accounting fees, legal fees—yes, counsel.

• • • • • • •

[fol. 177] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Honorable Peirson M. Hall, Judge Presiding

No. 33950 CD

UNITED STATE OF AMERICA, Plaintiff

v.

BEN BLUE, Defendant

REPORTER'S TRANSCRIPT OF PROCEEDINGS

• • • • • • •

[fol. 178] APPEARANCES:

For the Plantiff: MANUEL L. REAL, United States Attorney, Los Angeles, California 90012; by J. BRIN SCHULMAN, Assistant United States Attorney.

For the Defendant: MORTENSON and MAXWELL, 961 East Green Street, Pasadena, California; by ERNEST R. MORTENSON, Esq., and CLYDE R. MAXWELL, JR., Esq.

* * * * * * *

[fol. 179] Los Angeles, California; Monday, February 8, 1965; 10:00 a.m.

(Other court matters.)

The Court: Very well. I guess that brings us down to United States v. Ben Blue.

The Clerk: Yes, your Honor. Case No. 33950, United States v. Ben Blue.

The Court: Proceed, counsel.

Mr. Mortenson: Yes, your Honor.

The Court: Mr. Mortenson, will you state what you expect to establish by evidence this morning and what legal points they go to. I have read your memorandum; in fact, I came down yesterday and spent all day reading these memoranda and these cases filed in this matter, and also a number of the cases cited. I have read both memoranda.

I would like to know specifically to what point you wish to address your evidence.

Mr. Mortenson: If it is agreeable with the court, my associate Mr. Maxwell will examine the witnesses and I will outline the case and state what we intend to show as far as the witnesses are concerned, if that procedure is agreeable to the court.

The Court: Yes, that is. However, I do not want too long a statement.

Mr. Mortenson: I will try to keep it as brief as [fol. 180] possible.

The Court: Very well.

STATEMENT BY COUNSEL IN BEHALF OF THE DEFENDANT

Mr. Mortenson: Before I mention the witnesses and the facts I am sure, having read the memorandum, that your Honor is aware of the basic issue and that is because a

jeopardy assessment was made and there was a subsequent Indictment that Ben Blue was compelled to testify against himself, he had to sign petitions that went to the Tax Court and, furthermore, when the assessments were made liens attached to not only all of his assets at that time, but after-acquired assets would be followed by the liens and any money which he paid to attorneys, for example, or accountants, would be saddled with a lien and at any subsequent time the Government could levy on these monies.

The Court: Let me see if I understand it correctly—there probably will be no contest of this fact—that the lien was filed about a year before the Indictment was returned?

Mr. Mortenson: Yes, your Honor.

The Court: That an investigative report concerned alleged criminality was under way when the lien was filed?

Mr. Mortenson: That is right, your Honor.

The Court: That the lien was filed and that Ben Blue, in order to protect his rights, had to either default or [fol. 181] file a petition before the Tax Court?

Mr. Mortenson: That is right, your Honor.

The Court: And that there is involved in the assessed taxes and in the petition in the Tax Court the taxes for the same years involved in this Indictment?

Mr. Mortenson: That is right, your Honor.

The Court: And your position is that if he proceeds in this Indictment he will have been compelled to be a witness against himself by virtue of having had to file a petition in the Tax Court or default to the Government's claim?

Mr. Mortenson: Precisely, your Honor. And we say that brings him squarely within Boyd v. United States where the Supreme Court held—

The Court: Well, I read the case.

Mr. Mortenson: May I mention that in the Boyd case it was not only held that the procedure was unconstitutional, but that in fact the statute itself was unconstitutional.

Now that is our position here.

The Court: I do not think in this proceeding that I can reach the constitutionality of the lien proceedings or the proceedings before the Tax Court, or that procedure or that statute.

Mr. Mortenson: Well, now, in the Heath case the Ninth Circuit held that the District Court had a right to and [fol. 182] should have dismissed the Indictment because the defendant could not have a fair trial.

Now that is our position here, that Ben Blue cannot have a fair trial and that the Indictment should be dismissed at this juncture.

Now that can be done on the ground that the procedure involved violates due process and violates his right to counsel of his choice, and also that he cannot have a fair trial because he has been compelled to file these documents in the Tax Court and to bring testimony against himself.

As I read the Heath case, this court can dismiss the Indictment; in fact, I believe we can establish facts stronger here than were existent in that case. In the Heath case the Government agents had been given some documents and when the case was about to go to trial a demand was made for those and the Government admitted that the documents were lost.

Well, now, the Government counsel in his brief says that the decision was based on the inability of the Government to produce the documents, but that is not what the court says in that case. The court says that it has the inherent right to dismiss an Indictment if it appears that the defendant cannot have a fair trial, it says it is like a judgment of acquittal, and that is why I say the case comes under the Heath case and whether the decision is that the statute [fol. 183] is unconstitutional is rather immaterial, it is a question of whether the defendant can have a fair trial within the meaning of the Heath case.

Now to come back to what we had intended to establish through the witnesses, the Government seems to claim that we have not made a showing that Ben Blue could pay counsel and could retain counsel.

That brings up the question of just what levies were made, whether Ben Blue was allowed any money to pay for counsel, to pay for accountants, or to pay other costs of trial.

Another thing involved is this, we hope to establish that it is the policy of the Government not to make jeopardy

assessments if criminal prosecution is contemplated, and we also would like to show that there is a correlation between the Tax Court cases and the criminal prosecution. In other words, that the Tax Court counsel correlates its work with the United States Attorney and, in fact, the collection officer coordinates his work with that of the United States Attorney.

* * * * * * *

[fol. 184] COLLOQUY

Mr. Schulman: Your Honor, before Mr. Gardner is called, I would like to state, if I may, that whatever that procedure may be the Government submits that it is immaterial to the determination of the issues of this proceeding, for two reasons: (1) there is nothing before the court to show that any statement of facts filed with the petitioner contain any incriminatory material, (2) even if it did contain grossly incriminatory material it hasn't been offered, that it is an admissibility of evidence question which should be determined at the time of trial. We may never offer it, even if there is anything to offer.

The Court: I take it that the plaintiff as part of the showing here is going to show that there were assessments levied and there was a petition filed and a copy of it? Do you have certified copies of the petition?

Mr. Maxwell: As a matter of fact, it has been stipulated to and conceded by the United States Attorney in his response to the defendant's motion.

Mr. Schulman: It has been conceded that a petition was filed and the statement of facts were attached to the petition but not that those statements of fact contained incriminatory material.

[fol. 185] The Court: Well, counsel, I am sort of at a loss to know what the law is about incriminatory material. The Supreme Court has made it very, very plain in all of its recent decisions, and especially when you read the minority opinions as to what the majority decided, that it lies solely in the discretion of a defendant as to whether or not what he says will incriminate him.

Mr. Schulman: There are several points in that, your

Honor, if I may state. The first point is, assuming that whatever—let us assume that in that statement of facts Mr. Blue said "I am guilty of all of the charges that the Government has brought against me for the following reasons," and outlines everything—now that is not a statement of fact, but assume it was, this procedure, which is a motion to dismiss the Indictment for a specific reason, does not bring that question to issue. This is not a motion to suppress evidence, it is a motion to dismiss an Indictment because of unfairness or some other ground.

The Court: You cannot suppress evidence that has already been obtained.

Mr. Schulman: Suppress it from use in the trial. That is what a motion to suppress evidence is.

Now if at the time of the trial the Government were to offer this statement of facts and say "Here is some additional evidence against Mr. Ben Blue," then the defendant [fol. 186] can properly say "Yes, that is not admissible, that was illegally obtained evidence." Maybe it was, maybe it wasn't. But that is the time to describe it or to decide it.

Right now we are talking about an issue that is not before the court, it hasn't been raised by a motion to suppress, and our concession—this goes back to the other point—the decision on what is or is not self-incrimination raises a whole new question which I don't think your Honor should rule on, and I dont know how your Honor can decide it without a motion to suppress evidence. If there is a motion to suppress, fine, then we can look at the statement of facts, see what it is, see if there was a waiver or whether it was voluntary, whether the question of the Fifth Amendment was ever raised when he filed the statement of facts, whether he could have done something else instead of filing, and then finally after having filed is there even anything incriminatory. But that is another question for another proceeding. I do not think it applies here.

Mr. Maxwell: If the court please, in the first instance Mr. Schulman is quite correct, what he is trying to do is make a motion to suppress out of our motion to dismiss. Our motion to dismiss is very simple in this particular

area and it is based on a very simple ground, that the Government by asserting this jeopardy assessment procedure knowingly forced the defendant to make petitions to [fol. 187] the Tax Court and make statements of fact relating to the very same years that are involved in the criminal case, all the time knowing that it intended to indict him.

The Court: Let us get your evidence in. Get your witnesses under way here.

Mr. Maxwell: Yes, your Honor.

Mr. Gardner, please.

Earl Gardner, called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full.

The Witness: Earl Gardner.

The Clerk: Your address, please?

The Witness: 834 Abbott Avenue, San Gabriel.

Direct examination.

By Mr. Maxwell:

Q. What is your occupation, Mr. Gardner?

A. I am an attorney with the Regional Counsel, San Francisco Region.

Q. Of the Internal Revenue Service?

A. Of the Internal Revenue Service.

Q. Will you give the court a brief idea of the duties of your position.

[fol. 188] A. I represent the Internal Revenue Service in matters before the Tax Court primarily.

Q. You have assigned to you certain cases involving Ben Blue, Axie Blue and Merry-Go-Round, Inc. on income taxes for the years 1958 to 1960?

Mr. Schulman: Your Honor, I will object to that as being immaterial and irrelevant to any issue before this court.

The Court: Overruled.

The Witness: Did you say 1958 to 1960?

By Mr. Maxwell:

Q. Yes.
A. Yes, I do have.
Q. Can you state how those cases arose?
A. I don't understand your question, counsel.
Q. Was a petition filed?
A. Yes, a petition was filed in each case.

The Court: What petition, by whom?

By Mr. Maxwell:

Q. By whom were the petitions filed, Mr. Gardner?
A. There was a petition filed by Ben Blue, a petition filed by Merry-Go-Round, Inc. and a petition filed by Axie Blue.
Q. As a matter of fact, it was a joint petition filed on behalf of Ben Blue and Axie Blue for the years 1958 and 1959?
[fol. 189] A. That is correct.
Q. And a separate petition filed for Ben Blue for the year 1960?
A. That is correct.
Q. And a separate one filed for Axie Blue for 1960?
A. That is correct.
Q. And then one petition on behalf of Merry-Go-Round, Inc. for the years 1958 to 1960?
A. That is correct.

The Court: The tax years involved in this Indictment are 1958, 1959 and 1960?
Mr. Maxwell: Yes, sir. And the Indictment involves the income taxes of Ben and Axie Blue for the years 1958 and 1959, Ben Blue for the year 1960, and Merry-Go-Round, Inc. for each of the years 1958 to 1960.
Q. Were these petitions filed as a result of a jeopardy assessment, Mr. Gardner?

Mr. Schulman: Objection, your Honor. That would ask of this witness as to why the petitions were filed.
The Court: The objection is sustained.
Had there been a jeopardy assessment made?

By Mr. Maxwell:

Q. Had there been a jeopardy assessment?
A. Prior to the filing of the petition?
Q. Yes.
[fol. 190] A. Yes, there had been.
The Court: What was the date of this?
The Witness: I don't have the exact date, your Honor.

By Mr. Maxwell:

Q. If I tell you it was made on or about April 9, 1963, would that refresh your recollection?
Mr. Schulman: Objection, your Honor. There is no evidence that this witness has anything to do with that jeopardy assessment whatsoever.
Mr. Maxwell: We are trying to get the information.
The Court: Doesn't it show in your records?
The Witness: Yes, it would, your Honor, but I don't have the records here.
Mr. Schulman: We will stipulate as to what the date of the jeopardy assessment was.
The Court: April 9, 1963?
Mr. Schulman: Yes, your Honor.
The Court: Very well.

By Mr. Maxwell:

Q. And the jeopardy assessment was declared to be erroneous and abated in part in June of 1963, Mr. Gardner?
A. I don't have my file here, counsel. I couldnt tell that.
The Court: Do you stipulate to that?
[fol. 191] The Witness: That would be a matter of record.
Mr. Schulman: I object to this as being immaterial, your Honor.
I stipulated in my answer that certain allegations made were true and we conceded these points. As to those points that were conceded I see no reason to go any further here. We certainly didn't concede the materiality, just the fact of their accuracy.
Mr. Maxwell: May I ask the clerk to mark this document for identification, please?
The Court: Have you shown it to counsel? What is it?

Mr. Maxwell: It is a Tax Court petition, your Honor. No, I haven't shown it to counsel. As soon as it is marked, I will.

The Court: Was there a 90-Day Letter?

The Witness: Are you asking me?

The Court: Yes.

The Witness: Well, I wasn't a party to this but after the jeopardy assessment has issued then it follows as a matter of procedure that a 90-Day Letter does issue after the jeopardy assessment has been made within a certain time.

The Clerk: Defendant's Exhibit A marked for identification.

(Document was marked Defendant's Exhibit A for identification.)

[fol. 192] (Exhibiting exhibit to counsel.)

Mr. Maxwell: Mr. Schulman, you have a copy of that petition in your file, I understand.

Mr. Schulman: I don't know what you understand, sir.

Mr. Maxwell: Will you stipulate that you have such a petition?

Mr. Schulman: No, I will not stipulate what the Government files consist of, sir.

By Mr. Maxwell:

Q. Will you tell me what this is, Mr. Gardner?

A. This appears to be a petition in the case of Ben and Axie Blue, docket No. 361263 in the Tax Court of the United States.

Mr. Schulman: There are several other documents attached to that, that I don't believe were filed with the petition as a part of the petition, your Honor, that are attached to this exhibit.

Mr. Maxwell: I think the witness is qualified, your Honor, to describe the exhibit and identify it. Mr. Schulman has had an opportunity to examine it.

The Witness: Is that what you wanted, counsel?

By Mr. Maxwell:

Q. You stated that this is a Tax Court petition.

A. This is a petition filed with the Tax Court.

Q. Is this a copy of one of the petitions assigned to [fol. 193] you?

A. I assume that it is. I haven't checked it but I imagine that it is.

Q. For what year is this?

A. 1958 and 1959.

Q. And there is a document attached to the body of the petition itself?

A. There is a copy of a notice of deficiency for the taxable years 1958 and 1959.

Q. Those are required to be a part of the Tax Court petition and attached, are they not?

Mr. Schulman: Objection, your Honor. That would call for a conclusion of law on the part of this witness.

Mr. Maxwell: This witness is an expert, your Honor.

The Court: Overruled.

The Witness: That is a requirement for filing a petition, yes.

By Mr. Maxwell:

Q. Is that 90-Day Letter attached to the petition the 90-Day Letter that was sent out as a result of a jeopardy assessment?

The Court: What is your question now?

Mr. Maxwell: Is the 90-Day Letter attached to the petition the 90-Day Letter sent out as a result of a jeopardy assessment?

[fol. 194] The Witness: I imagine it is.

By Mr. Maxwell:

Q. Does it so state?

A. It states in the first page of the copy of the notice of deficiency that such is the case.

Q. Now does your office receive copies of these petitions when they are filed, Mr. Gardner?

A. Does my office receive copies of the petition?

Q. Yes.

A. Yes.

Q. If there is a criminal case pending within the Internal Revenue Service, what do they do, do they send copies of the petition to be associated with the criminal file?

Mr. Schulman: Objection, your Honor. That is immaterial and irrelevant to the scope of these proceedings.

The Court: Overruled.

The Witness: Are you speaking of this case, counsel? I am not sure that I understand the question. I am not trying to fight you.

By Mr. Maxwell:

Q. I asked you what the general procedure is when a criminal case is pending and you receive a Tax Court petition——

The Court: Not when a criminal case is pending. You mean when a criminal investigation is pending.

[fol. 195] By Mr. Maxwell:

Q. When a criminal investigation of any kind is pending, do you send copies of the petitions to be associated with the criminal file?

A. May I ask, are you considering whether a case is pending with the Department of Justice?

Q. Wherever the criminal case may be pending.

The Court: Well, I do not understand that. I wish you would clarify it.

Let me first of all establish whether or not this is true. In the hierarchy of the Internal Revenue Bureau you have Deputy Collectors and then you have Agents, is that right?

The Witness: That is correct.

The Court: The Agents are more or less auditors.

The Witness: Yes.

The Court: Then you have Special Agents.

The Witness: Yes.

The Court: When the matter goes to the Special Agent that is for investigation of possible criminal violation.

The Witness: I am not an expert in that field, judge, but I am aware in general that generally that would be true.

The Court: When an investigation has commenced by [fol. 196] any Special Agent of a possible criminal violation, that is the period that you are speaking about now, after that is commenced are you notified?

The Witness: Well, I am not—I couldn't answer that. It may be and it may not be. If we are notified then certain steps are taken.

By Mr. Maxwell:

Q. All right. If you are notified, Mr. Gardner, what steps do you take?

A. And where is it, in the Special Agent's hands?

Q. Let us say in the Special Agent's hands.

A. We attempt to coordinate.

Q. What do you mean, you "attempt to coordinate?"

A. Well, the matter would be handled by our Enforcement Division, it would be coordinated with the Enforcement Division of the Regional Counsel's office, and I am not in that Enforcement Division so I don't know what steps there would be, but that is what I would do, I would coordinate with the Enforcement Division.

The Court: By "coordinate," you mean you would keep them informed of all documents and papers and any information that came to your attention concerning the matter?

The Witness: Yes.

By Mr. Maxwell:

Q. Would you forward to the Special Agent through the [fol. 197] Enforcement Section copies of the Tax Court petitions?

A. I am sorry but I don't know what the Enforcement counsel would do. I just don't know.

Q. Now let us take where a criminal investigation has been concluded by the Special Agent and it has been forwarded to the Regional Counsel and you receive the Tax Court petitions, knowing of the criminal case, would you forward copies of the Tax Court petition to the Regional Counsel?

Mr. Schulman: Objection, your Honor. I understood that the questions for this witness were going to be related to a petition and a statement of facts supposedly containing incriminatory material.

The Court: He just said he doesn't know, that all he does is refer it to the Enforcement counsel.

Is that right?

The Witness: Yes, sir.

The Court: You have somebody called the Enforcement counsel?

The Witness: Yes, we do have, judge.

The Court: You would transmit to the Enforcement counsel copies of the petition?

The Witness: Yes.

The Court: And any other information you had?

The Witness: Any type of pleading, yes. We attempt to coordinate and take our instructions from them.

[fol. 198] The Court: What the Enforcement officer does after that you don't know?

The Witness: I can't say now. I don't know, no, I don't.

By Mr. Maxwell:

Q. What is the general procedeure in your office, Mr. Gardner?

Mr. Schulman: My objection is the same as to that, your Honor. I think he has answered that. You have got him now up to the Enforcement lawyer and from there he says he doesn't know.

By Mr. Maxwell:

Q. Mr. Gardner, you were formerly an Enforcement lawyer, isn't that correct?

A. Yes, I was.

Q. What did you do with them when you were an Enforcement lawyer?

Mr. Schulman: Objection, your Honor. Again this has nothing to do with the statement of facts or petition which was filed in this proceeding. It is dealing with policy of another matter.

The Court: Overruled.

The Witness: At the time I was Enforcement lawyer, that was about 8 years ago, the procedure may have been changed.

[fol. 199] By Mr. Maxwell:

Q. What was the procedure then, Mr. Gardner?

Mr. Schulman: Objection, your Honor, as to what the procedure was 8 years ago.

The Court: Let us find out what happened. Who is the Enforcement counsel that you forward this to?

The Witness: I myself forwarded the only one I had, and that was in the case of Merry-Go-Round. The other cases I got them after the pleadings were filed in this matter.

The Court: You got them after——

The Witness: After the petition and the answer had been filed in this case.

The Court: You mean in the Tax Court cases?

The Witness: Yes, your Honor.

By Mr. Maxwell:

Q. You mean you were assigned those cases after they had been handled by another attorney in your office?

A. That is correct.

Q. So you didn't hold out but you do have available to you the files, don't you, Mr. Gardner?

A. Oh, yes.

Q. Would those files disclose whether or not the Tax Court petition was forwarded to the Special Agent by the Enforcement counsel?

Mr. Schulman: Objection, your Honor.

[fol. 200] The Court: Overruled.

The Witness: Was forwarded to the Special Agent?

Mr. Maxwell: Yes.

The Witness: I don't think they do, counsel, I don't think they disclose that.

By Mr. Maxwell:

Q. At the time you received the petition in Merry-Go-Round, where was the criminal case pending?

A. With the Department of Justice.

Q. When did you receive the petition?

A. The petition in Merry-Go-Round?

Q. Yes.

A. It was filed on July 29, 1963.

Q. At that time the criminal case was pending in the Department of Justice, was it?

A. I don't know. At that time I didn't have the case. The case was not assigned to me as yet.

The Court: What does the file show?

The Witness: I don't know. I don't have that information. Whatever the record shows I will agree with.

Mr. Maxwell: Your Honor, may I ask that the witness be requested to secure his file? I understood he was going to bring his file this morning.

The Court: Do you have your file here?

The Witness: I don't have it here, your Honor.

[fol. 201] The Court: Where is it?

The Witness: It is in the Subway Terminal Building.

The Court: We will excuse you while you go down and get it in both of these matters.

The Witness: I understood—may I say this?

Mr. Maxwell: You can say anything you want.

The Witness: The only thing I understood I was to do was to explain the procedure, that the pleadings that we have we coordinate with the Enforcement Division, and it is a matter of record that they are forwarded to the Department of Justice.

The Court: And this was done?

The Witness: There is no question about that.

The Court: And this was in the Department of Justice when the petition was filed?

The Witness: Well, that is a specific question I can't answer, but in this case the pleadings are forwarded for information purposes.

Is there anything more you want than that, counsel?

Mr. Maxwell: Yes, your Honor. I want to know what his procedure is when a case is with the Intelligence Division because that is where the case was at the time he received it, at the time counsel received the Tax Court petitions.

The Court: He stated, or I misunderstood him, I understood him to say that when the petitions were filed by [fol. 202] the taxpayers in this case the case had already been referred to the Department of Justice Criminal Division.

The Witness: I stated, your Honor, I believe, that I didn't know whether it had been forwarded and that if it

were with the—he asked me whether I knew what happened when it was with the Intelligence Division.

The Court: I understood you to say just a moment ago, and I made a note of it, that the criminal case was pending in the Department of Justice on July 29, 1963 when you received the petition in the Tax Court.

The Witness: That is what I didn't know. What I did state was that the petition was filed on July 29, 1963, and he asked me if I knew whether or not at that time it was pending with the Department of Justice, and I didn't know.

Mr. Maxwell: At this time, your Honor, I will ask Mr. Schulman to stipulate that the Tax Court pleadings, the petitions and the answers, of Ben Blue, Axie Blue and Merry-Go-Round, Inc. are contained in his files as an integral part of the criminal case.

Mr. Schulman: I won't stipulate to that, your Honor, because I don't know. I won't stipulate that it is in the file, and whether or not it was in the file, whether or not it is an integral part of the file, whatever that means.

Again I take the position that all of this is completely outside the scope of these proceedings. If the Govern-
[fol. 203] ment intended to offer this statement of facts that is attached to the petition that your Honor is now looking at, that would be another issue at that time.

Mr. Maxwell: Your Honor, I desire to show that by the actions of the Government in levying a jeopardy assessment and forcing a defendant to make statements of fact concerning his income tax liabilities for 1958 to 1960, no matter what those statements of fact may be, that they have taken unfair advantage of the defendant, and one of the ways in which they take unfair advantage of the defendant is that these pleadings are immediately forwarded for consideration of the Special Agent and anyone else who has anything to do with the criminal case, and they are considered as an integral part of that case, an unseparable portion of the Government's evidence against a defendant.

This is where we say that the Boyd case applies.

Mr. Schulman: Of course it is again the Government's position that he has not shown anywhere that what is in there could or has prejudiced the defendant in the slightest.

Mr. Maxwell: I think the court is well aware of the

decisions that state that any statement of a defendant on a material matter can constitute a link in the chain of evidence against him.

Mr. Schulman: In a question on the ruling of the admission of evidence, but not on a motion to dismiss the [fol. 204] Indictment.

Mr. Maxwell: Even a mere denial in oral conversation with a superior has been held to be a statement.

Mr. Schulman: What case is that, counsel?

Mr. Maxwell: That is in the case of a confession.

The Court: What do you want to get from this witness now? I haven't learned much from him so far, I am frank to confess.

Mr. Maxwell: I haven't either, your Honor.

I would like to get from this witness when the petitions for the Tax Court were filed and when they were forwarded for association with the criminal file.

The Witness: I can give you information as to when they were filed.

The Court: All right. When were they filed with the Tax Court?

The Witness: The petitions?

The Court: Yes.

The Witness: They were all filed on July 29, 1963.

By Mr. Maxwell:

Q. Can you state that copies of the petitions that were forwarded were associated with the criminal file?

A. I don't have that information.

Q. Will your files disclose that?

A. I will look at them and see.

[fol. 205] Could you tell me this, counsel, where the criminal case is at this time?

The Court: That is what he is trying to find out.

Mr. Maxwell: He knows where it is. I believe it was with the Intelligence Division, your Honor.

Mr. Schulman: It was with the Intelligence Division and I can't understand why counsel asked him if it was with the Department of Justice.

Mr. Maxwell: Well, now, Mr. Schulman, I didn't ask him if it was with the Department of Justice, I asked

him where the case was and he said he thought it was with the Department of Justice. Please don't misquote me.

Mr. Schulman: That wasn't my understanding. Again is the witness being asked to bring something particular?

I might volunteer this: I was asked by counsel to ask Mr. Gardner to be here, I was not asked to have Mr. Gardner bring any records.

The Court: What do you keep down there, a docket sheet?

The Witness: We have a file, Judge, that has the pleadings in it.

The Court: Do you have a docket sheet which shows what happens on a certain date?

The Witness: Not as such, but I can pick out the different pleadings.

[fol. 206] The Court: I think you better go down and get the file and be back here at 2:00 o'clock with it. You may step down now.

You know what files to bring?

The Witness: I suppose I better bring them all.

The Court: Not all that you have in your office, just these that relate to Ben and Axie Blue and Merry-Go-Round and—isn't there another corporation mentioned?

The Witness: Not another corporation.

The Court: There isn't? All right.

(Witness temporarily excused.)

Mr. Maxwell: Your Honor, in the meantime I think maybe we would be well served by having Mr. Leslie, who is a Collection Officer, take the stand and advise us of the collection procedure undertaken in jeopardy assessments.

The Court: Very well.

Ralph Leslie, called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 207] Direct examination.

* * * * * * *

[fol. 208] By Mr. Maxwell:

Q. Now were these notices of Federal tax liens filed on the same day, Mr. Leslie?

Mr. Schulman: On the same day as what, counsel?

Mr. Maxwell: On each one. There are about six liens there.

Q. Were they all filed on the same day?

A Yes. All the liens filed in relation to the jeopardy assessments were filed on the same day.

Q. What day was that?

A. That was April 12, 1963.

Q. Where were they filed, Mr. Leslie?

A. Los Angeles County Recorder.

Q. Are they still on file?

A. Yes, they are.

Q. Have they in any way been abated?

A. Well, the liens are not in themselves abated.

[fol. 209] Q. Have they been satisfied or shown to be satisfied of record?

A. I think there was one account that was partially abated, and the balance was paid, yes, sir.

Q. Has that been withdrawn from the County Recorder's, that lien? In other words, has a satisfaction of lien been filed?

A. Well, I will have to correct that. This lien against Merry-Go-Round covered four different accounts. One was satisfied, the other three have not been, so a release has not been filed yet.

Q. So all of the liens in Exhibit B are still valid and outstanding so far as your records show?

A. That is correct.

Q. And no satisfaction of any of those liens have been entered?

A. We haven't filed any releases, no.

Q. Now do the tax liens state the amount of tax due?

A. They state the amount of the assessment, yes.

Q. Now was there a portion of the assessment abated in June of 1963 after these liens were filed in April?

A. Yes, there was.

Q. Were the liens refiled to show the amount, a lesser amount of taxes?

A. No, we don't do that. We don't file a release until [fol. 210] the entire amount is paid.

Q. So as far as your office is concerned, you have liens outstanding for the original amount of taxes assessed in April of 1963?

A. There is still filed with the County Recorder as they were filed originally, yes.

Q. They have not been modified in any way?

A. No, they haven't.

Q. In addition to filing the tax liens, did you make levies?

A. Yes, I did.

Q. What levies did you make, and against whom?

A. I levied on the Security First National Bank at 14th and Wilshire.

Q. How do you make a levy, Mr. Leslie?

A. It is a Form 668-A that we serve upon the person who is indebted to the taxpayer.

Q. Do you have one of those that you made in this case?

A. Do I have the levies?

Q. Yes.

A. Yes, I have.

* * * * * * *

[fol 211] EARL GARDNER, called as a witness by and in behalf of the defendant, having been previously duly sworn, resumed the witness stand and testified further as follows:

The Court: You have been at the office and have gotten your file in this matter?

The Witness: Yes, I have, your Honor.

The Court: Go ahead, counsel.

Direct examination (continued).

By Mr. Maxwell:

Q. Now, Mr. Gardner, does your file disclose where the criminal case file was located at the time the petitions were filed to the Tax Court?

A. At the time the petitions were filed?
[fol. 212] Q. Yes.
A. I can guess from the file where it was but there is nothing to indicate plainly where they were, no.
The Court: Is there any indication in your file as to when the criminal investigation began?
The Witness: No, there isn't, your Honor.

By Mr. Maxwell:

Q. Do you have a copy of the Special Agent's report in your file?
A. No, I do not.
Q. Was it ever included as a part of your file?
A. I think it was made available. The file indicates it was made available to the attorney who had the case at the time the petition was filed.
The Court: Is there anything in your file that indicates when you sent the petitions that were filed by the taxpayer to your Enforcement Division?
The Witness: Yes, there is, your Honor. That would be by transmittal of October 17, 1963.
Mr. Maxwell: October 17, 1963?
The Witness: Yes.

By Mr. Maxwell:

Q. In what case?
A. That would be in all cases.
The Court: Is there any indication as to what your [fol. 213] Enforcement Division did with it?
The Witness: No indication.

By Mr. Maxwell:

Q. As a matter of fact, Mr. Gardner, doesn't your file indicate that the enforcement branch of your own office had the criminal file at that time?
A. This is at October 17th?
Q. Yes.
A. At that time, yes.

Q. As a matter of fact, the enforcement branch wrote a memorandum down to your office requesting these copies, did it not?

A I believe—I don't believe there is any such memorandum in the file.

Q. How did you come to send them up to the regional counsel, then?

A. I didn't, Mr. Maxwell.

Q. How did it happen that they were sent then?

The Court: Just as a matter of course?

The Witness: I believe that is the procedure, when they are with the enforcement counsel we coordinate with the enforcement counsel.

By Mr. Maxwell:

Q. But you would have had to have had some basis, you don't send copies of all your pleadings that you receive in [fol. 214] the Tax Court to the enforcement counsel, do you?

A. I believe that we do.

Q. All of them?

A. When the case is with the enforcement counsel I believe we send them all pleadings.

Q. Yes, but you had to know that the case was with the enforcement counsel first before you would send him copies of the pleadings, isn't that right?

A. That is true.

Q. How did you know that in this case? How was that known in this case?

A. The file doesn't disclose that.

The Court: What is the usual course of business?

The Witness: Well, it would be in many ways. The Special Agent could confer with our office here, for example.

The Court: In other words, it could be done orally or in writing?

The Witness: It could be, yes.

The Court: But you do not send your files to the enforcement counsel unless the enforcement counsel makes known their desire to have them or you are advised that they

need them in connection with enforcement proceedings?

A. The minute that we know that there is a case with Enforcement, we do send them the pleadings.

The Court: What do you mean, "Enforcement"?

[fol. 215] The Witness: The enforcement counsel in the office of the Regional Counsel, which is located at the present time in San Francisco.

The Court: Well, what does the enforcement counsel do? When does he step into a tax proceeding, as in this case? Does the enforcement counsel step into a tax proceeding before the—what do you call it, the first step that is taken?

Mr. Maxwell: The Special Agent's report?

The Court: No, the jeopardy assessment and notice of lien.

The Witness: Well, now there is a question. I couldn't answer that, Judge. I could state what happened in this case.

The Court: All right. What happened in this case?

The Witness: In this case the jeopardy assessment, I believe you stated it was in April of 1963?

Mr. Maxwell: That is correct.

The Court: Yes.

The Witness: And the case was forwarded to our office, that is, the Regional Counsel's office, from the Intelligence Division sometime just prior to or in October of 1963. That is the best I can get from this file. These are not accurate.

The Court: Do you have some notion about what the enforcement counsel does? I mean he isn't in every tax [fol. 216] case, is he?

The Witness: He is in every tax case where there is a recommendation of criminal action.

The Court: I see. That is what I mean. He is not in every tax case where there is a notice of lien and levy and jeopardy assessment.

The Witness: Not necessarily, no.

The Court: Very well.

By Mr. Maxwell:

Q. And at this time in October your file discloses that the Regional Counsel was considering a recommendation

for criminal prosecution in the Ben Blue case, is that right?

A. Yes.

Q. Now what is the procedure in your office insofar as these information copies of the Tax Court petitions are concerned, do they stay with the criminal file after you have sent them in?

Mr. Schulman: Your Honor, that would be beyond this witness' scope of knowledge. If he sends it up, that is all he knows.

Mr. Maxwell: He may know, your Honor.

The Court: If he knows. If he doesn't know, he can say so.

The Witness: I don't know what they do, your Honor.

[fol. 217] By Mr. Maxwell:

Q. Do you know what the general procedure is?

A. I don't know what it is now, Mr. Maxwell.

Q. What did it used to be, Mr. Gardner?

Mr. Schulman: If we could have a point of time as to what he means by "used to be."

The Court: Yes, I think that would be a good idea.

By Mr. Maxwell:

Q. You were with the Enforcement Section of the Office for many years, were you not, Mr. Gardner?

A. For 3 or 4 or 5, maybe.

Q. When did you transfer over to the Appellate Section?

A. About 1955 or 1956.

* * * * * * *

[fol. 218] Mr. Maxwell: Let me ask once again Mr. Schul-
[fol. 219] man to stipulate that the copies of the Tax Court pleadings in this case were attached to the criminal file in the Regional Counsel's Office and then went to the Department of Justice with the criminal file and came to his office with the criminal file.

The Court: Came to whose office?

Mr. Maxwell: Until it came to Mr. Schulman's office it was attached to the criminal file.

Mr. Schulman: Your Honor, I don't think that we should properly make such a stipulation, and I have stated that before.

Mr. Maxwell: Well, your Honor, can I ask Mr. Schulman to produce from his files copies of the Tax Court pleadings at this time? I respectfully request the court to make such an order.

The Court: Well, I think that you might be entitled to see the original.

Mr. Schulman: That would be in the Tax Court file.

Mr. Maxwell: The original is in the Tax Court. Of course the problem here is what happens to these copies that were referred to the Enforcement Division of the Regional Counsel's office. I am sure the court is familiar with the procedure, that the Regional Counsel recommends prosecution and that it then goes to the Department of Justice and from there to the United States Attorney's office. [fol. 220] Mr. Schulman: I don't think what is in the Government's file, whether work papers, Special Agents' notes or otherwise, are discoverable under any rule of Federal law.

The Court: I think that if it is a statement by a defendant, a copy of it is.

Mr. Schulman: He has the statement, your Honor. Whether or not it is in my files is immaterial.

The Court: Whether or not it is in your file does become material.

Mr. Schulman: It does become material?

The Court: It does become material.

Mr. Schulman: If what your Honor means, if it is a statement of the defendant he is entitled to see it, he has produced it and he knows what it is.

The Court: But he is entitled to know whether or not it is in your file or just remained in the Tax Court files.

Mr. Schulman: That is the point that I respectfully disagree with the court on.

The Court: I think he is entitled to the production of a copy, if you have it, of your file copy if you have it.

Mr. Schulman: Is your Honor then ordering the Government to open its file for counsel to determine whether or

not it is, or is your Honor ordering the Government to produce from our file particular records?

The Court: Just one copy, if you have it, and that [fol. 221] is the copy of the taxpayer's petition in the Tax Court cases, if you have it.

Mr. Schulman: I would like to ask your Honor one further question. In light of the extensive Bill of Particulars which has been granted in this case, and counsel of course have had wide discovery far and above what they have needed to protect against future double jeopardy——

Mr. Maxwell: I will take issue with that statement, for the record, your Honor.

The Court: Well, all right. We will assume that you take issue with everything he says.

Mr. Schulman: I wonder whether or not counsel is going to be seeking, in this motion later on or in future motions, to determine more about what is or is not in the Government's file.

The Court: I have no idea, counsel, and I cannot reach that until we get to it. All I am saying is that now it has been established that the petitioner, the defendant in this case, did file in the Tax Court before the matter was presented to the Grand Jury a verified petition, and all I am ordering now is that you produce a copy of that petition, if you have it.

Mr. Schulman: I will stipulate, your Honor, that each of the petitions filed by Ben Blue, Ben Blue and Axie Blue and Merry-Go-Round which has been referred to in the [fol. 222] testimony so far are presently a part of the United States Attorney's case file.

The Court: And came with the Special Agent's report?

Mr. Schulman: They came to us with the report when it was referred to us from the Department of Justice.

The Court: Very well. Will you accept the stipulation?

Mr. Maxwell: I accept the stipulation, your Honor.

The Court: Very well. Then it is unnecessary for you to produce such document.

Mr. Schulman: I was going to say that we can dispense with the further testimony then tracing the chain of events; otherwise, we have wasted time with the stipulation.

The Court: Yes, I would think so.

Mr. Maxwell: Yes.

Q. Just one more question, Mr. Gardner. What happens to the case when the Regional Counsel's Enforcement Section makes a decision for prosecution? Does it go to the Department of Justice?

The Court: He just said that it did.

The Witness: It is my understanding that it does. I am not in Enforcement now. It is my understanding that that is what happens.

The Court: Very well. The witness may be excused. [fol. 223] You may take your file with you.

The Witness: Thank you.

(Witness excused.)

Mr. Maxwell: If the court please, may I ask just one question—not of Mr. Gardner, of the court—I have copies of the Tax Court petitions here. These are filed of course with a recognized Board, I believe, and Court, and I ask if the court desires to take judicial notice of them or desires me to produce the documents.

The Court: You have produced them here.

Mr. Maxwell: That is one of them. There are actually four of them.

The Court: I would think that you should produce them.

Mr. Maxwell: Thank you.

The Court: For the limited purposes of this motion.

Mr. Maxwell: Yes, your Honor.

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RALPH LESLIE, called as a witness by and in behalf of the defendant, having been previously duly sworn, resumed the witness stand and testified further as follows:

* * * * * * *

[fol. 224] Direct examination (continued).

By Mr. Maxwell:

Q. The liens are still valid, are they not?

A. They are still on file, yes.

Q. And you could issue today any levy against property belonging to Mr. Blue, is that correct?

A. That is correct.

Q. As a matter of fact, it is your duty to do so if you find some property, isn't that right?

A. Yes, that is right.

Q. So if any property comes to your attention it is part of your duties to make the levy, is that correct?

A. Yes, sir. It is not necessarily a duty. I am not required to make the levy. We haven't touched Mr. Blue's earnings, for example.

Q But there is no reason why you couldn't, though?

A. We would be authorized to do so.

Q. At the time the jeopardy assessment came to you, [fol. 225] did you find that there was a criminal case pending, did you know there was a criminal case pending against Mr. Ben Blue?

The Court: You mean criminal investigation?

Mr. Maxwell: Criminal investigation.

The Witness: Yes, I knew that.

By Mr. Maxwell:

Q. Where did that information come from?

A. I believe it was from Mr. Freeman.

Q. Did Mr. Freeman bring to you the jeopardy assessment in order to have you make the collection and levy?

Mr Schulman: Objection, your Honor, unless counsel is attacking the validity of the jeopardy assessment, which again would be improper in this proceeding.

The Court: Objection sustained.

Mr. Maxwell: Your Honor, I was trying to find out what the procedure was, how this information came to Mr. Leslie's hands. I think it is important.

The Court: He said that Mr. Freeman called him on the phone and told him.

Was that the first you knew about this?

The Witness: Well, I had been advised that the assessments were being made and then after that Mr. Freeman telephoned me.

The Court: He telephoned you and told you of the criminal investigation and of the assets?

[fol. 226] The Witness: Yes.

By Mr. Maxwell:

Q. And of course you were kept informed all the way along that the criminal case has been pending since that time?

Mr. Schulman: Objection, your Honor, as immaterial.

The Court: Sustained.

Mr. Maxwell: That is all I have from Mr. Leslie.

The Court: Any questions?

Mr. Schulman: Just one moment.

(Conference.)

Cross examination.

By Mr. Schulman:

Q. Mr. Leslie, you say there have been no further levies on any earnings of Mr. Ben Blue since the levies that you referred to specifically?

A. That is correct.

Q. Have you been asked not to make any further collections or levies?

The Court: Asked by whom?

Mr. Schulman: By any other branch of the Internal Revenue Service.

The Witness: I have been requested by Intelligence not to make any further collection efforts at this point.

By Mr. Schulman:

Q. And you have made no further collection efforts or [fol. 227] further levies either?

A. No, I have not.

Q. The ones you have described are the only ones?

A. Yes.

Mr. Schulman: Thank you.

Redirect examination.

By Mr Maxwell:

Q. Mr. Leslie, is it your understanding that the Intelligence Division has authority to direct your collection efforts?

A. If an investigation is under way they can request that we not take any action, yes.

Q. Can they also request that you do take action?

A. Yes, I suppose they could do that too.

Q. In other words, when a criminal investigation is under way then you are in the control, so to speak, of the Intelligence Division, is that correct?

Mr. Schulman: Objection, your Honor.

Mr. Maxwell: I think that is a fair summation, your Honor.

The Court: Overruled.

That is, you are subject to orders of the Intelligence Division?

The Witness: Yes, I would say yes to that.

[fol. 228] Mr. Maxwell: That is all.

The Court: What is your position, what is the title of your position?

The Witness: I am a Revenue Officer.

The Court: Revenue Officer?

The Witness: Yes.

The Court: They have changed them then.

The Witness: They used to be, I think, Deputy Collectors.

The Court: Now you are a Revenue Officer?

The Witness: Yes, sir.

By Mr. Maxwell:

Q. But you are still in the Collection Section?

A. Collection Division.

Q. Collection Division?

A. Yes, sir.

Mr Maxwell: Thank you.

Recross examination.

By Mr. Schulman:

Q. Mr. Leslie, when you say you are subject to the orders of the Intelligence Division, are you subject to orders or is this done as a matter of cooperation?

A. I think it is a poor choice of wording. Actually, we are not ordered but we are requested to do or not to do [fol. 229] certain things, and we cooperate.

Q. This isn't a matter of direction, they don't direct the operations of the Collection Division?

A. No.

The Court: Who does?

Mr. Schulman: The local Director.

The Witness: The local Director of course is in charge of the entire District, and then we have a chief of the Collection Division.

Mr. Maxwell: And the Director is also in charge of the Intelligence Division, is he not?

The Witness: Yes.

Mr. Maxwell: That is all.

Mr. Schulman: I have no further questions.

The Court: The local Director is in charge of the Intelligence Division?

The Witness: Well, he is in charge of the entire District.

The Court: Very well. You may step down.

(Witness excused.)

Mr. Maxwell: Your Honor, I have for the record copies of the Tax Court petitions with respect to Merry-Go-Round, Inc. for the years 1958 to 1960 inclusive which I ask be marked as Defendant's Exhibit next in order.

The Clerk: Exhibit D.

[fol. 230] (Documents were marked Defendant's Exhibit D for identification.)

Mr. Maxwell: A petition to the Tax Court in the case of Axie Blue v. Commissioner for the year 1960.

The Clerk: No. E.

(Document was marked Defendant's Exhibit E for identification.)

Mr. Maxwell: A petition to the Tax Court of Ben Blue for the year 1960.

The Clerk: No. F.

(Document was marked Defendant's Exhibit F for identification.)

Mr. Maxwell: I offer Exhibits D to F in evidence.

I think you will find you have copies in your files, Mr. Schulman.

Mr. Schulman: I thought we had gone through this already.

The Court: He can still look at them.

Mr. Schulman: I might just comment that these documents are more than just the petition. I think attached to each one of these is what purports to be the 90-Day Letter.

Mr. Maxwell: Mr. Gardner testified that the 90-Day Letter was an integral part of the petition, and it is, your Honor.

The Court: He testified that it was required to be [fol. 231] attached.

Mr. Schulman: I think it was required to be sent out.

The Court: No, required to be attached to the petition.

Mr. Maxwell: Do you have Exhibit C, Mr. Clerk?

(The exhibit referred to was passed to counsel.)

Mr. Maxwell: Your Honor, I do not believe Exhibit C has been offered in evidence and I will also offer it at this time.

The Court: It is admitted, and so are the others.

Mr. Schulman: My objections, your Honor, are to the materiality and relevancy and in general having absolutely nothing to do with the proceedings before this court on a motion to dismiss an Indictment.

The Court: The objection is overruled. They are all admitted.

(Exhibits marked Defendant's Exhibits C, D, E and F were received in evidence.)

The Court: They are admitted for the limited purposes of this motion only.

Next witness.

Mr. Maxwell: Mr. Robert Lund, head of the Intelligence Division is here, and I would like to ask him to take the stand for a few minutes, your Honor.

[fol. 232] ROBERT K. LUND, called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Robert K. Lund.

The Clerk: And your business address?

The Witness: Room 1726 Post Office and Court House Building, Los Angeles.

Direct examination.

By Mr. Maxwell:

Q. What is your occupation, Mr. Lund?

A. Chief, Intelligence Division, Internal Revenue Service, Los Angeles District.

Q. Mr. Lund, I am going to ask you to advise us as to the policy of the Internal Revenue Service and the Intelligence Division in general as to the levying of civil liabilities in a case where criminal investigation is pending.

The Court: I think you can ask him what the usual course of business is; I don't think you can ask him what the policy is.

Mr. Maxwell: I am sorry, your Honor. I meant to ask him what the usual course of business was.

Mr. Schulman: Your Honor, I would like to object to that on this ground: What was done in this case—I don't see any objection to Mr. Lund testifying—what they [fol. 233] generally do in matters I don't think would be determinative as to whether or not what was done here was in violence of the law. It either was proper or was not proper. What they generally do, I don't think there is any issue as to that, and I think it is also invading the Intelligence Division's own procedural method of operation.

Mr. Maxwell: Your Honor, part of our contentions in this case are to the effect that it is the general business practice of the Internal Revenue Service where criminal investigation is pending and a criminal prosecution is

intended to be undertaken, that no assertion of the civil tax liability of a taxpayer are undertaken prior to the final conclusion of the criminal case.

The Court: I think that is material, Mr. Schulman, to know what the general course of business is, so the objection is overruled.

The Witness: Would you restate your question, please, now?

Mr. Maxwell: Yes, Mr. Lund.

Q. What is the general course of business with respect to the assertion of civil liabilities where criminal investigation is undertaken?

A. Civil liabilities generally are not assessed until after the criminal phases of the case have been disposed of.

The Court: Is that all?

[fol. 234] Mr. Maxwell: Yes, I think that is all, your Honor.

Mr. Schulman: I do have a question.

Cross examination.

By Mr. Schulman:

Q. If the District Collector has a belief that the collection of the revenue will be in jeopardy even though a criminal investigation is underway, is it the policy of the—pardon me—is it the general course of business of the Intelligence Division not to recommend a jeopardy assessment?

Mr. Maxwell: I say that is improper cross examination, your Honor.

Mr. Schulman: Let me rephrase it.

The Court: I think it would be a good idea, because I got lost.

By Mr. Schulman:

Q. Is it the general course of business that you refer to, sir, to refrain from perhaps jeopardy assessments where there is a criminal investigation underway, that is, does that policy hold true if there is a strong belief that the collection of the revenue will be in jeopardy?

Mr. Maxwell: If the court please, that calls for a hypothetical answer on the part of the witness.

The Court: Yes, it does. He was just asked about the [fol. 235] general course of business.

Mr. Schulman: May I have the witness' answer to Mr. Maxwell's question read back then, your Honor?

The Court: Yes. Would you find that, Mr. Reporter.

(The record referred to was read by the reporter as follows:

> "Q. What is the general course of business with respect to the assertion of civil liabilities where criminal investigation is undertaken?
>
> "A. Civil liabilities generally are not assessed until after the criminal phases of the case have been disposed of.")

By Mr. Schulman:

Q. Are there times when civil liabilities are assessed before the criminal matter is disposed of?

A. There have been.

Q. What are the occasions or what are the situations when they are assessed before the criminal matter is disposed of?

A. When the investigating agents determine that the tax might be in jeopardy because the assets might be dissipated or transferred or removed from the jurisdiction of the country.

Q. Then if that situation exists, even though there may be a criminal matter pending, the civil liability may [fol. 236] nevertheless be assessed?

A. It may be.

Mr. Schulman: Thank you.

Redirect examination.

By Mr Maxwell:

Q. Now, Mr. Lund, is this done very often?

A. Well, a situation like that doesn't arise very often. I can't give you any percentage as to the number of times that the situation arises in which we do assess first.

Q. How many times did it arise last year?
A. I couldn't tell you.

Mr. Schulman: Objected to as immaterial. The quantitative determination does not tend to impeach or be of further aid to the court on Mr. Lund's testimony.

Mr. Maxwell: I think it might be, your Honor, in this particular instance.

The Court: I don't know. He may answer the question. If you know.

The Witness: I don't know.

By Mr. Maxwell:

Q. Did it happen in more than one case?
A. I really couldn't tell you. I haven't made any study.
Q. About how many cases do you process in a year, [fol. 237] Mr. Lund?

Mr. Schulman: I object to that as immaterial, your Honor.

The Court: I don't see how it is material.

By Mr. Maxwell:

Q. Do you know of any other case besides the Ben Blue case in the last year that a jeopardy assessment has been levied on after a criminal investigation had been started?
A. I can't recall of any, but there might have been.
Q. Do you review these recommendations?
A. I do.

Mr. Maxwell: That is all.

The Court: You may step down.

* * * * * * *

[fol. 238] Ernest R. Mortenson, called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, for the record.
The Witness: Ernest R. Mortenson.
The Clerk: Your business address?
The Witness: 961 East Green Street, Pasadena.

Direct examination.

By Mr. Maxwell:

Q. You are an attorney, Mr. Mortenson?

A. Yes, I am.

Q Will you state your backgorund in income tax laws and criminal cases in particular.

A. Well, I was two years Special Assistant to the Attorney General of the United States in the Tax Division, Washington, D. C., and I believe eight or nine years in the office of Regional Counsel of the Treasury Department, two years of which I believe I was designated what was then called the District Director, Enforcement.

Q. Since that time have you been engaged in the private practice of law?

A. Yes.

Q. Any particular specialty?

A. I have specialized in taxation.

[fol. 239] The Court: You mean you specialize in taxation or trying to avoid taxation?

The Witness: Well, Justice Holmes said that taxes were the way be buy civilization. I believe in that, but I do not believe anyone should pay any more taxes than he owes.

By Mr. Maxwell:

Q. Have you examined the Bills of Particulars in this case?

A. Yes, I have. There are two Bills of Particulars, the first Bill of Particulars was found by the court not to be in response to the request for the Bill of Particulars and a supplemental one has been filed.

Q. In the course of your occupation with Internal Revenue and the Department of Justice and since you have been in private practice, have you had to handle bank deposit cases?

A. I have reviewed many bank deposit cases as a member of the Regional Counsel's staff. I am the author of a book called "Federal Tax Fraud Law," and there was a section in that book dealing with bank deposit cases as well as net worth cases.

And I believe I have done a considerable amount of research aside from the study of cases.

The Court: Bank deposit cases are what are otherwise [fol. 240] known as in-and-out cases, so much money in and so much money out?

The Witness: Yes, or it is classified as a method of indirect proof rather than specific item or direct proof.

By Mr. Maxwell:

Q. In your review of the Bills of Particulars based upon your experience, what was your opinion as to the necessity for an accountant to assist the attorney who may represent the defendant Ben Blue at the trial?

A. In my opinion it would be impossible to effectively represent a defendant in a bank deposit case such as this one without having an accountant take the stand and explain to the finders of fact or the finder of fact just what the figures meant that were adduced by the Government.

The Court: That would require a prior analysis by him of the years involved?

The Witness: A very careful analysis of every item of deposit in the bank account.

The Court: And every item that went out?

The Witness: That should be done; yes, your Honor.

The Court: Every item that went in and every item that went out and where from.

The Witness: That is right, because otherwise there may be redeposits, there may be deposits of non-taxable income, and there may be deposits that are completely in [fol. 241] error and can be demonstrated to be so.

By Mr. Maxwell:

Q. In addition, it would take an analysis of the cash expenditures of the defendant during the years in question, would it not?

A. Yes.

Q. Because, of course, the cash expenditure would not necessarily have been a deposit in the bank account.

A. That is right, because the bank deposits which are considered by the Government to be income are added on

to expenditures which are not reflected in any of the bank account items.

* * * * * * *

[fol. 242] ARGUMENT IN BEHALF OF THE PLAINTIFF

Mr. Schulman: Basically it is with reference to the citation of authorities, your Honor. I wish to call the court's attention that the cases cited in the reply brief for the proposition that the Federal Court has the power to vacate a criminal proceeding where a jeopardy assessment is used to take unfair advantage of the defendant, for that proposition of law the defense have cited the Rea case, United States v. Heath, and McNabb v. United States. I think a reading of those cases will show——

The Court: I think it is evident from both parties' briefs that there is no case squarely in point except the Brodson case.

[fol. 243] Mr. Schulman: Brodson, O'Connor and Summers I think are all close.

The Court: I think the O'Connor and Summers case are not squarely in point, and as I stated, I do not agree with the Seventh Circuit and their ruling on the Brodson case, that a defendant has to wait until after the trial is over before an examination can be made as to whether or not he was properly represented or whether or not he has been unfairly put on trial. The reasoning in that case if it were followed would certainly preclude the courts from ever granting any motion to suppress evidence.

Mr. Schulman: Of course that wasn't raised on a motion to suppress.

The Court: I know it was not raised on a motion to suppress.

In the Summers case the court there stated that there was no showing that there was a necessity for an accountant in order for the lawyer to render effective service, and that case can be distinguished on that ground and, moreover, it was long prior to the opinion by Judge Fee in United States v. Heath in the Ninth Circuit.

In the O'Connor case, that is not applicable here because there were 22 months after the Indictment was returned

before the jeopardy assessment was levied and the court said that it is manifest that during all this long preliminary [fol. 244] period the defendant had full opportunity to prepare his defense as well as opportunity after the levying of the assessment to bring that circumstance to the attention of the court.

So there the assets were not tied up, they were free for 22 months after the Indictment was filed.

Here the jeopardy assessment was made before the Indictment was filed, it was made under the uncontradicted testimony of Mr. Mortenson and his uncontradicted affidavit that he was advised in November 1962 that a recommendation would be made for criminal prosecution and the jeopardy assessment was not levied until the following April. So there isn't any doubt but what the Government was proceeding on a collision course with this defendant criminally before the jeopardy assessment was levied.

The question that has disturbed me somewhat as I first glanced at these papers, so much so that I came down yesterday and spent the day trying to resolve some of the questions of law, in view of the fact that the defendant has earned a substantial amount of money in the year 1964 it would seem to me that the court would not be justified in granting the motion to dismiss because he was deprived of his right to counsel, and the testimony is that he has engagements.

Of course I realize that it is true that under the law the Director of Internal Revenue may impose liens or [fol. 245] distraints—I guess they call them "liens" now, they used to call them "distraints"—at any time, so I don't think that the defendant would be entitled to a dismissal on that ground.

I am much bothered, however, by the fact that the jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was going to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has concerning the same years and concerning whether or not there was fraud or

whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself.

The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one Government, and all of the agencies work for one United States of America.

I read the Boyd case, and I am satisfied that under the Boyd case and under the Heath case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, [fol. 246] that the court should dismiss the Indictment, and I will dismiss it on that ground alone.

Mr. Schulman: May I ask your Honor just one thing in that regard? If the Government were at this time to advise this court that it has no intention to, nor will it in any way, offer that petition in the Tax Court or any statement attached to it in evidence against the defendant—and I do so make such a representation to this court at this time, that the Government will not seek to do so—I strenuously do not think that there would be any prejudice to the defendant.

The Court: I do not think that that would change the legal effect of compelling him to come forward in the Tax Court and disclose his tax or have a default taken against him for the taxes and for the fraud penalty. I do not think it would cure that. I think that when the Government set in motion the jeopardy assessment and the 90-Day Letter which compelled him to come forward within a certain time and file his petition in the Tax Court, and then when they did that they foreclosed themselves from proceeding in the criminal case during that time.

Mr. Schulman: Even though nothing which may have been filed by the defendant, and even though he did not raise a question of self-incrimination at that time, and even though the trial has not yet occurred and we don't [fol. 247] know if that evidence would be offered or the

Government has now said that it is telling the court it would not offer such evidence, and without that admissibility of evidence question your Honor still feels that defendant has been deprived of certain rights?

The Court: I think so, counsel. It is a very narrow ruling and I would like very much to see the matter taken up on appeal and tested, because it is a case of first impression, it is a novel and unusual question, and I take it that if an appeal becomes necessary here perhaps the Government might stipulate to release sufficient funds to permit counsel to represent him on appeal.

Mr. Schulman: Very well. May I have the court's indulgence for just one moment?

The Court: Yes.

(Conference between counsel.)

Mr. Schulman: Your Honor, just one question?

The Court: Yes.

Mr. Schulman: If the Government were able to stipulate that certain funds might be released to pay counsel, this would have nothing to do with the court's ruling on the other issue now made?

The Court: That is right. I have held that they have not made a sufficient showing as a matter of fact that he is deprived of his right to employ counsel. I do know, and [fol. 248] as you and we all know, the Government may at any time file a lien against earnings, they may file an order of distraint, so they could completely make him impotent financially in the event of an appeal by the Government from this ruling, which I earnestly hope will be taken so that we may establish what the law is in this field.

Mr. Schulman: Very well. In essence—and I certainly don't want to detract from any of the language that your Honor more artfully put in stating your ruling—but in substance then hasn't your Honor said that the making of a jeopardy assessment subsequent to a time when a criminal investigation is under way in and of itself——

The Court: And followed by an Indictment.

Mr. Schulman: —and followed by an Indictment——

The Court: Yes.

Mr. Schulman: —then if there is a jeopardy assessment then in essence your Honor has held that the Government could not indict without violating the rights of the defendant.

The Court: That is right. I think I have framed my ruling narrowly enough so that the Appellate Court will be able to catch on to it. If they don't, they will frame one of their own.

Mr. Schulman: Your Honor is not going to write an opinion on this?

[fol. 249] The Court: No, I have too much else to do. I am sorry. All I am suggesting is that in the event you do take an appeal that the Government give consideration either to a stipulation that they will not levy a distraint against sufficient money for him to hire counsel to defend him on that appeal.

Mr. Schulman: Well, it may well be that such might be worked out, your Honor, and I suppose if an appeal is in order that the time to determine that will be after the matter is back in the District Court, if it is back in the District Court.

The Court: Well, I think the time to determine it would be while the matter is on appeal. I imagine that the Internal Revenue Bureau and the Department of Justice will probably want to take an appeal here. At least I earnestly hope they do take an appeal.

Mr. Maxwell: Is bail exonerated, your Honor?

The Court: Bail is exonerated.

The Clerk: And counsel will prepare an order?

The Court: No.

The Clerk: Can he appeal from a Minute Order?

The Court: Yes, he can appeal from a Minute Order and an order. I suppose counsel better secure a copy of the transcript and file it.

Mr. Schulman: Is your Honor discussing the consti-[fol. 250] tutionality in deciding this?

The Court: No.

Mr. Schulman: You are not saying what rights of the defendant have been violated here.

The Court: Yes, I am.

Mr. Schulman: This is what confuses me.

The Court: Yes, I have. They have compelled him to come forward and assert in a petition where he is the aggressor, he is the petitioner, and establish facts concerning the very things that are concerned in this Indictment in order to prevent a civil judgment from being taken against him, just as in the Boyd case.

Mr. Schulman: Your Honor did not consider, I assume, the fact that he might have paid the tax rather than file a petition?

Mr. Mortenson: With what?

Mr. Schulman: That might well have been a point, your Honor. We have no evidence that he could not have paid the tax instead of filing that petition.

Mr. Maxwell: They have levied on all his assets, your Honor. That wasn't enough to pay the tax.

The Court: I think the inference can be made from the levying on all of his assets and the fact that there was not sufficient return from the levy to pay the tax, that the inference can be drawn that he did not have sufficient [fol. 251] money to pay the tax, and I will draw that inference.

Mr. Schulman: Very well.

The Court: Court is adjourned.

(Whereupon, at 4:30 o'clock p.m., court was adjourned.)

[fol. 252] CERTIFICATE

No. 33950 CD

UNITED STATES OF AMERICA, Plaintiff

v.

BEN BLUE, Defendant

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing 150 pages is a true and correct transcript of the proceedings had in the above-

entitled cause on the date specified herein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of February, 1965.

Agnar Wahlberg
Official Court Reporter

[fol. 253] DEFENDANT'S EXHIBIT A

IN THE TAX COURT OF THE UNITED STATES

Docket No. 3612-63

BEN AND AXIE BLUE, Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION

The above-named Petitioners hereby petition for a redetermination of the deficiencies set forth in the notice of deficiency (Code 411:90D:TC) by the Commissioner of Internal Revenue dated June 6, 1963 and as a basis of the proceeding allege as follows:

1. The Petitioners herein are Ben and Axie Blue, c/o Ernest R. Mortenson, 961 East Green Street, Pasadena, California.

2. The returns for the periods here involved were filed with the District Director of Internal Revenue in Los Angeles, California. The notice of defieciency (a copy of which is attached and marked Exhibit A) was mailed to the Petitioners on June 6, 1963.

3. The deficiencies as determined by the Commissioner for income taxes and penalties are for the calendar years 1958 and 1959 in the following amounts:
[fol. 254]

Year	*Deficiency*	*Penalty Sec.* 6653(b)
1958	$ 9,172.51	$ 4,586.26
1959	20,492.94	10,246.47
	$29,665.45	$14,832.73

The entire deficiencies and all of the penalties are in dispute.

4. The determination of the deficiencies and penalties set forth are based upon the following errors:

1958

a. The Commissioner erred in determining that the Petitioners received dividend distributions in the amount of $18,256.56 in the taxable year 1958 which they failed to report.

b. The Commissioner erred in determining that all or part of the deficiency for the taxable year 1958 was due to fraud with the intent to evade tax.

1959

c. The Commissioner erred in determining that the Petitioners received dividend distributions in the amount of $33,544.12 in the taxable year 1959 which they failed to report.

d. The Commissioner erred in determining that the Petitioners received additional income from Dorchester Music Company in the amount of $3,450.00.

e. The Commission erred in disallowing part of the $2,905.75 claimed on the income tax return as medical expense for the year 1959.

f. The Commissioner erred in determining that all or part of the deficiency for the taxable year 1959 was due to fraud with the intent to evade tax.

[fol. 255] 5. The facts upon which Petitioners rely as a basis for this proceeding are as follows:

1958

a. The Petitioners reported and paid taxes on any dividend distributions received by them in the taxable year 1958.

b. No part of the deficiency determined by the Commissioner for the taxable year 1958 was due to fraud with the intent to evade tax on the Petitioners' part.

1959

c. The Petitioners reported and paid taxes on any dividend distributions received by them in the taxable year 1959.

d. The Petitioners received no income from Dorchester Music Company in any amount that was not reported on their Federal income tax return filed for the taxable year 1959.

e. The Petitioners paid the medical expenses claimed on their income tax return filed for the year 1959 which they were permitted to deduct from their gross income.

f. No part of the deficiency determined by the Commissioner for the taxable year 1959 was due to fraud with the intent to evade tax on the Petitioners' part.

WHEREFORE, Petitioners pray that this Court may hear the proceeding and determine that there are no deficiencies and penalties due from the Petitioners.

/s/ Ernest R. Mortenson
Ernest R. Mortenson

Counsel for Petitioners
961 East Green Street
Pasadena, California

[fol. 256] VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK) ss.

BEN BLUE, being duly sworn, deposes and says:

That he is the Petitioner above-named;
That he has read the foregoing Petition and is familiar with the statements contained therein, and
That the statements contained therein are true, except those stated to be upon information and belief, and that these he believes are true.

/s/ BEN BLUE
Ben Blue

Subscribed and sworn to before me this 17th day of July, 1963.

/s/ Joan D. Hays
Notary Public in and for said
County and State

[fol. 257] VERIFICATION

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

AXIE BLUE, being duly sworn, deposes and says:

That she is the Petitioner above-named;
That she has read the foregoing Petition and is familiar with the statements contained therein, and
That the statements contained therein are true, except those stated to be upon information and belief, and that these she believes are true.

/s/ AXIE BLUE
Axie Blue

Subscribed and sworn to before me this 22nd day of July, 1963.

ETHEL B. LEACHMAN
Notary Public in and for said
County and State

[fol. 258] SEAL

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

District Director

Los Angeles 12, California

June 6, 1963

In reply refer to Code 411:90D:TC 688-4183

CERTIFIED MAIL

Received June 12, 1963

Mr. Ben Blue and
Mrs. Axie Blue
Husband and Wife
817 North Roxbury Drive
Beverly Hills, California

Taxable Years Ended	*Deficiency*	Code Section 6653(b) *Penalty*
December 31, 1958	$ 9,172.51	$ 4,586.26
December 31, 1959	$20,492.94	$10,246.47

Dear Mr. and Mrs. Blue:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the above-noted taxable years discloses deficiencies in tax and penalties in the amounts shown above. Assessment of the deficiencies has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiencies.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanctions provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner
By R. A. Riddell
District Director

Enclosure:

Statement

[fol. 259] EXHIBIT A

STATEMENT

Code 411:90D:TC

Mr. Ben Blue and
Mrs. Axie Blue
Husband and Wife
817 North Roxbury Drive
Beverly Hills, California

Tax Liability for the Taxable Years Ended
December 31, 1958
December 31, 1959

Summary of Deficiencies

Year		*Deficiency*	*Penalty Sec. 6653(b)*
1958	Income tax	$ 9,172.51	$ 4,586.26
1959	Income tax	20,492.94	10,246.47
Total		$29,665.45	$14,832.73

Summary of assessments made under the provisions of internal revenue laws applicable to jeopardy assessments on April 9, 1963 for the taxable years ended December 31, 1958 and December 31, 1959

Year		*Deficiency*	*Penalty*	*Interest to 4-9-63*
1958	Income tax	$12,023.18	$ 6,011.59	$2,874.86
1959	Income tax	28,015.27	14,007.64	5,017.80
Total		$40,038.45	$20,019.23	$7,892.66

[fol. 260] It has been found necessary in this determination to make certain adjustments in the assessments made on April 9, 1963, under the provisions of the internal revenue laws applicable to jeopardy assessments. The assessments will be abated to the extent they exceed the deficiencies set forth herein. The adjustments are summarized as follows:

Year	*Assessment in excess of liability*	
	Income tax	*Penalty*
1958	$ 2,850.67	$1,425.33
1959	7,522.33	3,761.17
Total	$10,373.00	$5,186.50

It is determined that all or part of the underpayment of tax required to be shown on the return for each of the taxable years ended December 31, 1958 and December 31, 1959 is due to fraud. Consequently, the 50 percent addition to the tax provided by section 6653(b) of the Internal Revenue Code is asserted for each year.

A copy of this letter and statement has been mailed to your representative, Mr. Ernest R. Mortenson, 961 East Green Street, Pasadena, California in accordance with the authority contained in the power of attorney executed by you.

It is determined that you received dividend distributions in each of the taxable years ended December 31, 1958 and

December 31, 1959 which you failed to report in your return for each of the aforementioned years. Accordingly, your taxable income is increased $18,256.56 for the taxable year ended ecember 31, 1958 and $33,544.12 for the taxable year ended December 31, 1959, computed as follows:

	Taxable Years Ended	*12-31-59*
Total dividend distributions received	$18,356.56	$33,644.12
Less: Allowable dividend exclusion	100.00	100.00
Increase in income	$18,256.56	$33,544.12

[fol. 261] ADJUSTMENT TO INCOME

Taxable year ended December 31, 1958

Taxable income as disclosed by return	$30,761.66
Additional income:	
(a) Income from dividends	18,256.56
Taxable income adjusted	$49,018.22

EXPLANATION OF AJUSTMENT

(a) This adjustment has been previously explained herein.

COMPUTATION OF TAX

Taxable year ended December 31, 1958

Taxable income adjusted	$49,018.22
Tax on $49,018.22	$19,720.75
Less: Dividends received credit (4% of $18,256.56)	730.26
Correct income tax liability	$18,990.49
Income tax liability shown on return, account No. BP 2000038	9,817.98
Deficiency of income tax	$ 9,172.51
Section 6653(b) penalty 50% of $9,172.51	$ 4,586.26

[fol. 262] ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1959

Taxable income as disclosed by return		$28,372.98
Additional income and unallowable deductions:		
(a) Income from dividends	$33,544.12	
(b) Additional compensation	3,450.00	
(c) Medical expense	1,109.82	38,103.94
Taxable income adjusted		$66,476.92

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained herein.

(b) It is determined that you received compensation in the amount of $3,450.00 from Dorchester Music Company which you failed to report in your return. Accordingly, your taxable income is increased $3,450.00.

(c) Due to the increase in your adjusted gross income a deduction for medical expense in the amount of $1,795.93 is allowable in lieu of the $2,905.75 claimed in your return. Accordingly, your taxable income is increased $1,109.82.

COMPUTATION OF TAX

Taxable year ended December 31, 1959

Taxable income adjusted	$66,476.92
Tax on $66,476.92	$30,530.00
Less: Dividends received credit (4% of $33,544.12)	1,341.76
Correct income tax liability	$29,188.24
Income tax liability shown on return, account No. BF 1512	8,695.30
Deficiency of income tax	$20,492.94
Section 6653(b) penalty 50% of $20,492.94	$10,246.47

[fol. 263] SEAL

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

District Director
Los Angeles 12, California

June 6, 1963

In reply refer to Code 411:90D:TC 688-4183

CERTIFIED MAIL

Received June 12, 1963

Mr. Ben Blue and
Mrs. Axie Blue
Husband and Wife
817 North Roxbury Drive
Beverly Hills, California

		Code Section 6653(b)
Taxable Years Ended	*Deficiency*	*Penalty*
December 31, 1958	$ 9,172.51	$ 4,586.26
December 31, 1959	$20,492.94	$10,246.47

Dear Mr. and Mrs. Blue:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the above-noted taxable years discloses deficiencies in tax and penalties in the amounts shown above. Assessment of the deficiencies has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiencies.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanctions provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner

By R. A. Riddell
District Director

Enclosure:

Statement

[fol. 264] DEFENDANT'S EXHIBIT D

IN THE TAX COURT OF THE UNITED STATES

Docket No. 3615-63

MERRY-GO-ROUND, INC., Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth in the notice of deficiency (Code 411:90D:TC) by the Commissioner of Internal Revenue dated June 6, 1963 and as a basis of the proceeding alleges as follows:

1. The Petitioner herein is Merry-Go-Round, Inc., a California corporation, c/o Ernest R. Mortenson, 961 East Green Street, Pasadena, California.

2. The returns for the periods here involved were filed with the District Director of Internal Revenue at Los Angeles, California. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the Petitioner on June 6, 1963.

3. The deficiency as determined by the Commissioner for income taxes and penalties are for the calendar years 1958 to 1960, inclusive, in the following amounts:

[fol. 265] *Summary of Deficiencies*

Year		*Deficiency*	*Penalty Sec. 6653(b)*
1958	Income Tax	$12,317.76	$ 6,158.88
1959	Income Tax	39,287.18	19,643.59
1960	Income Tax	24,906.60	12,453.30
Total		$76,511.54	$38,255.77

The entire deficiencies and all of the penalties are in dispute.

4. The determination of deficienceis and penalties set forth in said deficiency notice are based upon the following errors:

1958

a. The Commissioner erred in determining that the Petitioner had unreported income in the amount of $13,728.01 or any other sum.

b. The Commissioner erred in disallowing $9,959.99 which were claimed by Petitioner in arriving at the cost of goods sold.

c. The Commissioner erred in determining that all or a part of the deficiencies for the taxable year 1958 was due to fraud on the Petitioner's part with an intent to evade tax.

1959

d. The Commissioner erred in determining that the Petitioner had unreported income in the amount of $45,642.04 for the taxable year 1959.

e. The Commissioner erred in disallowing $12,234.31 which were claimed by Petitioner in arriving at the cost of goods sold.

f. The Commissioner erred in disallowing rental expense in the amount of $13,518.38 for the taxable year 1959.

[fol. 266] g. The Commissioner erred in disallowing automobile depreciation in the amount of $3,259.52 for the taxable year 1959.

h. The Commissioner erred in disallowing automobile expense in the amount of $1,036.67 for the taxable year 1959.

i. The Commissioner erred in determining that all or a part of the deficiencies for the taxable year 1959 was due to fraud on the Petitioner's part with an interest to evade tax.

1960

j. The Commissioner erred in determining that there was unreported income in the amount of $26,614.66 for the taxable year 1960.

k. The Commissioner erred in disallowing $11,202.20 which were claimed by Petitioner in arriving at the cost of goods sold.

l. The Commissioner erred in disallowing rental expense in the amount of $16,086.23 for the taxable year 1960.

m. The Commissioner erred in disallowing automobile depreciation in the amount of $1,926.00 for the taxable year 1960.

n. The Commissioner erred in disallowing automobile expense in the amount of $1,493.53 for the taxable year 1960.

o. The Commissioner erred in determining that all or a part of the deficiencies for the taxable year 1960 was due to fraud on the Petitioner's part with an intent to evade tax.

5. The facts upon which Petitioner relies as a basis of this proceeding are as follows:

[fol. 267] 1958

a. The Petitioner reported its entire income for the year 1958 on its Federal income tax return filed for that year and it failed to report no income of any kind derived by it during the year 1958.

b. The purchases claimed on the income tax return in arriving at the cost of goods sold were correctly and properly entered on said return.

c. No part of the deficiency assessed by the Commissioner for the taxable year 1958 is due to fraud on the Petitioner's part with an intent to evade tax.

1959

d. The Petitioner reported its entire income for the year 1959 on its Federal income tax return filed for that year and it failed to report no income of any kind derived by it during the year 1959.

e. The purchases claimed on the income tax return in arriving at the cost of goods sold were correctly and properly entered on said return.

f. The deductions taken for rental expense for the year 1959 constituted ordinary and necessary business expense.

g. The deductions taken for depreciation on automobile constitutes ordinary and necessary business expense.

h. The deductions taken for automobile expense constitute ordinary and necessary business expense.

i. No part of the deficiency assessed by the Commissioner for the taxable year 1959 is due to fraud on the Petitioner's part with an intent to evade tax.

[fol. 268] 1960

j. The Petitioner reported its entire income for the year 1960 on its Federal Income Tax Return filed for that year and it failed to report no income of any kind derived by it during the year 1960.

k. The purchases claimed on the income tax return in arriving at the cost of goods sold were correctly and properly entered on said return.

l. The deductions taken for rental expense for the year 1960 constituted ordinary and necessary business expense.

m. The deductions taken for depreciation on automobile constitutes ordinary and necessary business expense.

n. The deductions taken for automobile expense constitute ordinary and necessary busniess expense.

o. No part of the deficiency assessed by the Commissioner for the taxable year 1960 is due to fraud on the Petitioner's part with an intent to evade tax.

WHEREFORE, Petitioner prays that this Court may hear the proceeding and determine that there are no deficiencies and penalties due from the Petitioner.

/s/ Ernest R. Mortenson
Ernest R. Mortenson
Counsel for Petitioners
961 East Green Street
Pasadena, California

[fol. 269] VERIFICATION

State of Nevada)
County of Clark) ss.

Ben Blue, being duly sworn, says that he is the President of the above-named corporation and that he is duly authorized to verify the foregoing petition, that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that these he believes to be true.

/s/ Ben Blue
Ben Blue

Subscribed and sworn to before me this 17th day of July, 1963.

/s/ Joan D. Hays

Notary Public in and for said
County and State

[fol. 270] SEAL

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

District Director

Los Angeles 12, California

June 6, 1963

In reply refer to Code 411:90D:TC 688-4183

CERTIFIED MAIL

Received June 12, 1963

Merry-Go-Round, Inc.
c/o Ernest R. Mortenson
961 East Green Street
Pasadena, California

Taxable Year Ended	*Deficiency*	*Penalty Code Section 6653(b)*
December 31, 1958	$12,317.76	$ 6,158.88
December 31, 1959	$39,287.18	$19,643.59
December 31, 1960	$24,906.60	$12,453.30

Gentlemen:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the

above-noted taxable years discloses deficiencies in tax and penalties in the amounts shown above. Assessment of the deficiencies has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiencies.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanctions provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner
By R. A. Riddell
District Director

Enclosure:

Statement

[fol. 271] STATEMENT

Code 411:90D:TC

Merry-Go-Round, Inc.
c/o Ernest R. Mortenson
961 East Green Street
Pasadena, California

Tax Liability for the Taxable Years Ended

December 31, 1958

December 31, 1959

December 31, 1960

Summary of Deficiencies

Year		*Deficiency*	*Penalty Sec. 6653(b)*
1958	Income Tax	$12,317.76	$ 6,158.88
1959	Income Tax	39,287.18	19,643.59
1960	Income Tax	24,906.60	12,453.30
Total		$76,511.54	$38,255.77

[fol. 272] *Summary of assessments made under the provisions of internal revenue laws applicable to jeopardy assessments on April 9, 1963 for the taxable years ended December 31, 1958, December 31, 1959 and December 31, 1960*

Year		*Deficiency*	*Penalty*	*Interest to 4-9-63*
1958	Income tax	$13,861.73	$ 6,930.87	$ 3,383.78
1959	Income tax	41,610.73	20,805.37	7,660.93
1960	Income tax	28,460.58	14,230.29	3,532.23
Total		$83,933.04	$41,966.53	$14,576.94

It has been found necessary in this determination to make certain adjustments in the assessments made on April 9, 1963, under the provisions of the internal revenue laws applicable to jeopardy assessments. The assessments will be abated to the extent that they exceed the deficiencies set forth herein. The adjustments are summarized as follows:

	Assessment in excess of liability	
Year	*Income tax*	*Penalty*
1958	$1,543.97	$ 771.99
1959	2,323.55	1,161.78
1960	3,553.98	1,776.99
Total	$7,421.50	$3,710.76